SUPREME COURT OF THE UNITED STATES.

No. 560.

P. B. FOUKE, ADMINISTRATOR OF JAMES B. TAYLOR, DECEASED, AND JOHN E. DEVLIN, MARTHA JOSEPHINE DEVLIN, AND LAURA S. TAYLOR, PLAINTIFFS IN ERROR,

VS.

W. H. ZIMMERMAN AND E. E. NORTON, ASSIGNEE, ETC.

AND

No. 561.

P. B. FOUKE, ADMINISTRATOR OF JAMES B. TAYLOR, DECEASED, AND JOHN E. DEVLIN, MARTHA JOSEPHINE DEVLIN, AND LAURA S. TAYLOR, PLAINTIFFS IN ERROR,

VS.

LOUIS HUBURT AND E. E. NORTON, ASSIGNEE, ETC.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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1 United States circuit court, fifth circuit and district of Louisiana.

JAMES B. TAYLOR & AL.
vs.
LOUIS HUBERT. } No. 6259.

JAMES B. TAYLOR & AL.
vs.
W. H. ZIMMERMAN. } No. 6260.

No. 6259.

Petition.—Filed July 15th, 1870.

To the honorable the judges of the United States circuit court for the fifth circuit and district of Louisiana:

The petition of James B. Taylor, John E. Devlin, Laura L.
2 Taylor, and Martha Josephine Devlin, who are citizens of the State of New York, and reside there, respectfully represents—

That Louis Hubert, a citizen of the State of Louisiana, is in possession of and claims the following described property in the parish of Orleans, within the jurisdiction of this honorable court, to wit:

Six lots of ground, with the improvements thereon, situate in the faubourg Livandais, fourth district of this city, in the square No. 55, in the original plan of said faubourg, which is bounded by Magazine, Live Oak, First, and Philip streets, the said lots being designated by the Nos. 1, 2, 3, 4, 5, & 6, on a plan drawn by Henry Maelhauser, on the 5th of May, 1846, and deposited in the office of L. R. Kerney, late notary public, in the parish of Jefferson, in this State, adjoining each
3 other, and measuring each thirty feet five inches front on Magazine street by one hundred and thirty feet in depth between parallel lines, said property forming the corner of Magazine and First streets, in said square, and estimated in the inventory of the succession of Elizabeth Clew, No. 15285 of the second district court of the parish of New Orleans, at five thousand five hundred dollars.

Also another lot of ground, with the improvements thereon, situate in the same square, adjoining the lots above described, and measuring twenty-seven feet six inches front on First street, between Live Oak and Magazine streets, by a depth of one hundred and eighty-two feet six inches between parallel lines, estimated at $700 00.

Petitioners represent that they are the owners of said property, and entitled to the possession of the same; which said property formed
4 a portion of the succession of said Elizabeth Clew, who died intestate, all of which will fully appear from the mortuary proceedings in said succession in said second district court.

They further represent that the rents and profits of said property are well worth $6 00 per month per lot, or $40 00 per month for the whole property, and that said property has been worth said sum since March 19, 1859.

Petitioners allege amicable demand and refusal to comply therewith.

Wherefore petitioners pray for citation, and that, after due proceedings, they may have judgment against said Louis Hubert, decreeing plaintiffs to be the owners of said property in the proportion of one undivided fourth each, and, as such, that they be placed in possession of said property.

Petitioners further pray for judgment for rents and profits in their

5 favor at the rate of forty dollars per month from 6th April, 1866, until they are placed in possession of said property, and that their rights be reserved against John F. Clew, or his succession, and the surety on his bond, to wit, Albin Rochereau, to claim the rents and profits of said property from the time said succession was opened, on the 19th March, 1859, up to the time these plaintiffs may be placed in possession thereof.

Petitioners pray for costs and for general relief.

(Signed) WALLACE & HANDLIN,
Att'ys for Pl'ffs.

I accept service of citation and copy of petition.
July 15th, 1870.
(Signed) L. HUBERT.

Answer and call in warranty.—Filed July 15th, 1870.

6 JAMES B. TAYLOR ET AL. *vs.* LOUIS HUBERT. } No. 6259.

United States circuit court, fifth circuit and district of Louisiana.

And now comes the defendant, and for answer says that he denies all and singular the allegations of said petition, except as hereinafter specially admitted. He admits that he is in possession of said property, but only as farmer or lessee, and that he has paid said rent to E. E. Norton, who he has understood has charge of said property, as assignee in bankruptcy.

Wherefore he prays that he may be discharged from the suit, and that said E. E. Norton may be called in to defend said suit.

(Signed) L. HUBERT.

Citation in warranty.

7 The President of the United States of America to the marshal of the district of Louisiana, greeting:

JAMES B. TAYLOR ET AL. *vs.* LOUIS HUBERT. } No. 6259.

You are hereby commanded to summon E. E. Norton, citizen of the State of , to comply with the demand of the defendant, Louis Hubert, a citizen of the State of Louisiana, contained in the answer and call in warranty, of which a copy and a copy of the petition accompany this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the

8 court is held, and that you make due return hereof on the first Monday of September, 1870.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this

15th day of July, A. D. one thousand eight hundred and seventy, and of the independence of the United States of America the 95th year.

[SEAL.] (Signed) D. URBAN, *Clerk.*
By F. B. VINOT,
D'y Clerk.

Marshal return.

Received July 19th, 1870, by the United States marshal, and on the 25th day of same month and year served copy of the within citation and the accompanying answer and call in warranty and petition on the within-named E. E. Norton, by leaving the same at his office in
9 the custom-house building in this city, in the hands of E. D. Lebreton, clerk in charge of said office, personally known to me, the said Norton being absent at the time of service.

NEW ORLEANS, *July* 25, 1870.
(Signed) S. W. REED,
D'y U. S. Marshal.

Default against warrantor.—Extract from the minutes, November Term, A. D. 1870.

NEW ORLEANS, *Tuesday 22d*, 1870.

Court met pursuant to adjournment. Present, the honorable E. H. Durell, district judge.

JAMES B. TAYLOR ET AL. *vs.* LOUIS HUBERT. } No. 6259.

On motion of Wallace & Handlin, att'ys for plaintiffs, and on
10 showing to the court that E. E. Norton, assignee called in warranty, has failed to answer altho duly cited,
Ordered that judgment by default be entered against him.

Rule by warrantor.—Filed November 25, 1870.

JAMES B. TAYLOR ET AL. *vs.* LOUIS HUBERT. } No. 6259.

On motion of Augustus De B. Hughes, att'y of E. E. Norton, assignee in bankruptcy of the estate of Harlow J. Phelps, and as such assignee called in warranty by Louis Hubert to defend the above entitled cause,
It is ordered by the court that plaintiffs do show cause on Wednesday, 30th November, 1870, at 11 a. m., why the default taken on
11 the 22 instant should not be vacated and set aside, and why said E. E. Norton, assignee as aforesaid, shall not have twenty days further time within which to file his answer, exception, or other plea to said petition, and call in warranty on the grounds filed.

Marshal's return.

Received November 26, 1870, by the United States marshal, and on the 28th day, same month and year, served a copy of the within rule on the plaintiffs herein through Wallace & Handlin, their attorneys, by

delivering the same to W. W. Handlin, one of said attorneys in person.
NEW ORLEANS, *November* 28, 1870.
(Signed) S. W. REED,
D'y U. S. Marshal.

Order default set aside.—Extract from the minutes of November 30th, 1870.

12 JAMES B. TAYLOR ET AL.
vs.
LOUIS HUBERT. } No. 6259.

By written consent of counsel, it is ordered that the default entered on the 22d November, 1870, be set aside, and that E. E. Norton, warrantor, have 10 days from this day in which to file his plea, exception, or answer.

Answer of warrantor.—Filed December 8th, 1870.

United States circuit court for the fifth judicial circuit and district of Louisiana.

JAMES B. TAYLOR ET AL.
vs.
LOUIS HUBERT. } No. 6259.
E. E. Norton, assignee, &c., called in warranty.

13 And now into this honorable court comes E. E. Norton, assignee in bankruptcy called in warranty by Louis Hubert, defendant herein, and in answer to the petition of plaintiffs herein, and the answer of the said Hubert, denies each and every allegation contained in said petition and answer, or in either of them, except as hereinafter specifically admitted.

This appearer admits that on the 28th day of May, 1868, he was appointed assignee of the estate of Harlow J. Phelps, surrendered in bankruptcy, and that as such assignee he has received the property described in said petition which was surrendered, by the said Phelps, as a part of his estate. He admits that he rented the same to the said Hubert on or about the day of July, 1868, and that the said
14 Hubert has paid him ten dollars as rent of said premises, but he denies that the said Hubert, or any other person, has ever paid him any other or further sum; and he avers that the said Hubert has been restrained and prohibited from paying this appearer by the plaintiffs herein. He denies that the plaintiffs, or any of them, are the owners of, or have any title to, or are entitled to the possession of, said premises. He admits that the property described in said petition is a part of the succession of Elizabeth Clew, deceased, but he denies that she died intestate.

And for further and separate answer, this appearer shows that said property was acquired bona fide by Harlow J. Phelps by purchase from John F. Clew, legatee of Elizabeth Clew, deceased, by act passed before Selim Magner, notary public, on or about the 6th day of April, A. D. 1866, and that said Phelps surrendered said property in bankruptcy as aforesaid.

15 And further answering, he shows—

I. That the will of Elizabeth Clew was duly probated in the second district court of New Orleans on the 25th day of January, A. D. 1861,

which judgment was in force at the time of the said sale to Phelps, and at the time of his surrender in bankruptcy, and now is.

II. That after the estate of the said Elizabeth Clew, deceased, had been duly and regularly administered upon and the debt paid, the universal legatee, viz, John F. Clew, was, on the 29th day of March, A. D. 1866, regularly put in possession thereof and specifically of the property now in controversy by decree of the said probate court, which judgment is still in full force, being unreversed and unannulled.

III. That meantime said will, which had also been probated
16 in the surrogate's court for the city and county of New York, was in a suit (res inter alias acta) reversed on the 5th day of December, A. D. 1864, by the supreme court of the State of New York, for the county of New York; that instead of an appeal being taken to the court of appeal*y*, the parties entered into a compromise by which further litigation was waived; and the said John F. Clew, having received a certain compensation, did, by a certain private deed, (which has never been recorded and of which this appearer and his grantors or assigners had and have no knowledge whatever,) give a release of all claim on his part to the succession of Elizabeth Clew, deceased.

Wherefore he prays that the demand of the plaintiffs be rejected with costs, and he prays for all general and special relief.

(Signed) A. VOORHEES,
AUG. DE B. HUGHES,
For E. E. NORTON.

17 Jury waived and cause continued.

Extract from the minutes of Thursday, January 12, 1871.

JAMES B. TAYLOR ET AL. *vs.* LOUIS HUBERT. } No. 6259.

By consent of counsel, now filed, the jury is waived, and the cause continued for trial before the court on Tuesday, 17th inst., at 11 a. m.

Note of Evidence.—Filed January 17, 1871.

JAMES B. TAYLOR ET AL. *vs.* LOUIS HUBERT. } No. 6259.

JAMES B. TAYLOR ET AL. *vs.* W. H. ZIMMERMAN. } No. 6260.

18 Plaintiffs offered in evidence the transcripts marked A & B, & documents C & D.

Defendant's counsel objects to the admissibility and reception of documents C & D. After argument the court reserved its ruling in the question.

Plaintiffs offered document marked "E;" also record No. 9163, U. S. district court; also 3 deeds, marked F, G, & H; also the testimony of Hubert, taken in the clerk's office.

Defendants offered judgment marked "I," sales marked K & L; also certificate register of conveyance "M;" also schedule in the matter of

H. J. Phelps, bankrupt, No. , of the docket U. S. district court, to be produced; also documents N & O.

Harlow J. Phelps sworn for defendant.

It is admitted that Mr. Symonds, if present in court, would
19 make the same statement as Mr. Phelps did.

Hearing and submission.—Extract from the minutes of Tuesday, January 17, 1871.

JAMES B. TAYLOR ET AL. vs. LOUIS HUBERT. } No. 6259.

JAMES B. TAYLOR ET AL. vs. W. H. ZIMMERMAN. } No. 6260.

These causes were called, and by consent of counsel tried together. Wallace & Handlin for pl'ffs, A. Voorheis & A. de B. Hughes for defendants; when, after hearing the pleadings, evidence, and argument, the court took time to advise, and requested the counsel to *to* furnish printed briefs.

20 *Motion and order.—Extract from the minutes of Thursday, March 30th, 1871.*

JAMES B. TAYLOR ET AL. vs. LOUIS HUBERT. } No. 6259.

On motion of P. B. Fouke, public administrator, and on suggesting the death of James B. Taylor, one of the plaintiffs herein,

It is ordered by the court, that P. B. Fouke, appointed administrator of the succession of James B. Taylor, by the honorable the second district court, of the *the* parish of Orleans, be made party herein, and authorized to prosecute this suit as the representative of said James B. Taylor, deceased.

Judgment.—Extract from the minutes of Monday, April 10th, 1871.

21 JAMES B. TAYLOR ET AL. vs. LOUIS HUBERT. } No. 6259.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that there be judgment recognizing the plaintiffs, James B. Taylor, John E. Devlin, Laura S. Taylor, and Martha Josephine Devlin as the lawful owners in the proportion of one undivided fourth each, of the following described property, to wit: Six lots of ground, with the improvements thereon, situate in the faubourg Livandais, fourth district of this city, in the square No. 55, in the original plan of said faubourg, which is bounded by Magazine, Live Oak, First, and Philips streets, the said lots being designated by the Nos. 1, 2, 3, 4, 5, & 6 on a plan drawn by Henry Maelhauser, on the 5th of May, 1846, and deposited in the office of L. R. Kerney, late notary public in the parish of
22 Jefferson in this State, adjoining each other, and measuring each thirty feet five inches front on Magazine street, by one hundred and thirty feet in depth between parallel lines. Said property forming the corner of Magazine and First streets in said square, and estimated

in the inventory of the succession of Elizabeth Clew, No. 15285, of the second district court of the parish of Orleans, at five thousand five hundred dollars.

Also, another lot of ground with the improvements thereon, situate in the same square adjoining the lots above described, and measuring twenty-seven feet six inches front on First street between Live Oak and Magazine streets, by a depth of one hundred and eighty-two feet six inches between parallel lines, estimated at $7,000 00.

It is further ordered and decreed that E. E. Norton, assignee
28 in bankruptcy of Harlow J. Phelps, bankrupt, called in warranty herein and holding possession of said property, do forthwith surrender the same to said plaintiffs.

It is further ordered that said assignee render an account showing the amount of rent received from the premises, and his expenses.

And it is further ordered that the costs of suit be paid by the plaintiffs, unless it be proven that there are funds enough in the bankrupt's estate to satisfy the same.

Rule and grounds for new trial.—Filed April 12, 1871.

JAMES B. TAYLOR ET AL. *vs.* LOUIS HUBERT. } No. 6259.

J. B. TAYLOR & AL. *vs.* W. H. ZIMMERMANN. } No. 6260.

On motion of defendants, through their counsel, Bellings &
24 Hughes, and A. Voorheis, suggesting that the judgment rendered by this honorable court is contrary to law and evidence; that a purchaser is protected by the mortuary proceeding of a succession in which his vendor, after a regular course of administration, has been placed in possession of the estate by final decree of the probate court,

Ordered, that plaintiffs show cause on April 26th, Wednesday, why a new trial should not be allowed.

Marshal's return.

Received April 13th, 1871, by the United States marshal, and on the same day, month, and year served a copy hereof on Wallace & Handlin, by handing the same to J. E. Wallace, a member of said firm in person.

(Signed) JOHN FAHY,
Dy Marshal.

25 *Submission of rule.—Extract from the minutes of Wednesday, 26th April,* 1871.

JAMES B. TAYLOR ET. AL. *vs.* LOUIS HUBERT. } No. 6259.

J. B. TAYLOR & AL. *vs.* W. H. ZIMMERMAN. } No. 6260.

The rule for a new trial in the above cases was called, and submitted by counsel on both sides.

Order, new trial granted.—Extract from the minutes of Friday, June 16, 1871.

JAMES B. TAYLOR ET AL.
vs.
LOUIS HUBERT. } No. 6259.

For reasons orally assigned by the court, it is ordered that the rule taken on the *on* 12th April, 1871, be made absolute; that the judg-
26 ment rendered on the 10th April, 1871, be set aside, and that a new trial be granted in this case.

Waiver of jury.—Filed June 17th, 1871.

JAMES B. TAYLOR ET AL.
vs.
LOUIS HUBERT. } No. 6259.

JAMES B. TAYLOR ET AL.
vs.
W. ZIMMERMAN. } No. 6260.

U. S. circuit court, district of Louisiana.

It is agreed by the undersigned counsel in the above-entitled causes to submit the same upon the evidence offered on the first trial, and a trial by jury is hereby waived.

(Signed) WALLACE & HANDLIN,
Att'ys for Pl'ff.

And upon the request on file to pass on the points.

(Signed) ALBERT VOORHEIS, *Att'y,*
" AUG. DE B. HUGHES, *For Def't.*

27 *Statement of facts.—Filed June 17th, 1871.*

United States circuit court, fifth circuit Louisiana.

JAMES B. TAYLOR ET AL.
vs.
LOUIS HUBERT, E. E. NORTON, ASSIGNEE OF Ha/low J. Phelps, bankrupt in warranty. } No. 6259.

United States circuit court, fifth circuit Louisiana.

JAMES B. TAYLOR ET AL.
vs.
W. H. ZIMMERMAN, E. E. NORTON, ASSIGNEE in warranty. } No. 6260.

These cases came on for trial on the 17th day of June, 1871, and the parties waiving trial by jury, filing a stipulation to that effect, consenting to a trial of the issue of the judge on the evidence on file at a former trial, and without further argument of counsel the case being submitted, thereupon the court finding the following facts as proved in the case, directs the same to be filed this 17th day of June, 1871.

28 Special finding of facts by the court. The evidence in these cases show the following state of facts:

That Mrs. Elizabeth Clew died in New York, in the year 1869.

That John F. Clew, her husband, their presented a written document purporting to be the last will and testament of the deceased, constituting him sole heir and universal legatee, to the surrogate of the county of New York, for probate, and in his petition acknowledged the present plaintiffs to be heirs at law, and had them duly cited.

The heirs at law contested the probate of the will, and on the 5th day of January, 1861, appealed from the decision of the surrogate's court to the supreme court of New York.

On the first Monday of February, 1861, the supreme court of New York reversed the order of the surrogate, appointing John F. Clew executor, in all things, including the probate, letters, testimony, etc., and made up certain issues of fact, and he submitted to a jury.

29 4. On the 15th day of November, 1866, the verdict of the jury on the issue of facts was rendered, declaring that the will was wholly revoked before the death of Elizabeth Clew, and that she died intestate, whereupon judgment was rendered accordingly on the 16th day of November, 1866, as is shown by document "C," made a part hereof.

5. On the 6th day of December, 1866, the surrogate of the county of New York ordered that the judgment of the supreme court of New York of November 16th, 1866, be the judgment of that court; all of which order and judgment will more fully appear from document marked "D," and made part hereof.

6. On the 19th day of March, 1859, A. F. Cochran, of New Orleans, applied to the second district court of New Orleans for the curatorship of the vacant succession of Elizabeth Clew in Louisiana. On the 13th day of April, 1859, he filed a supplemental petition, claiming to be the attorney in fact of the heirs at law.

30 7. John F. Clew opposed the application of A. F. Cochran for the curatorship, and on the 25th day of January, 1861, presented a copy of the will to the second district court of New Orleans for probate, together with the certificate of the surrogate of the county of New York showing that an appeal had been taken to the supreme court of the State of New York, which document was admitted to probate without notice to the present plaintiffs or their agent, and without trying the opposition then pending.

8. An inventory was then ordered January 25th, 1861, which showed real estate valued at $22,500, and personal property valued at $3,200.

9. On the 19th day of August, 1864, John F. Clew filed his final account.

10. On the 29th day of March, 1866, John F. Clew applied to the probate court of New Orleans for a discharge, and to be plassed in possession of the property, and the order was granted and signed same

31 day, without notifying the heirs at law or their agent; all of which will more fully appear from the document marked "A," from folio 1 to 83, which is made part hereof.

11. It is further shown in evidence, that John F. Clew, on the 8th day of September, 1864, disposed of all his right, title, interest, and claims, both in law and equity, of, in, and to all and singular the real estate of which the said Elizabeth Clew died seized or possessed, to the heirs at law.

12. It further appears in evidence, that on the 6th day of April, 1866, John F. Clew sold eight lots of ground, in the city of New Orleans, to

Harlow J. Phelps, which he claimed to have inherited from his deceased wife, Elizabeth Clew, (maiden name Day,) as universal legatee, and as having been put in possession by the second district court of New Orleans on the 29th day of March, 1866, which was duly recorded; which will appear from document R & A, and made part hereof.

13. Also, that on the 11th day of April, 1866, said deed and act
32 of sale was recorded in the office of the register of conveyance of New Orleans, which will appear from document G, made part hereof.

14. It also appears that on the 2nd day of May, 1866, a certain deed, dated September 8th, 1864, from John F. Clew to the heirs at law of Elizabeth Clew was recorded in the office of the register of conveyances of the city of New Orleans, as appears from document "N," made a part hereof.

15. On the 18th day of July, 1868, the heirs at law of Elizabeth Clew, deceased, brought an action in the United States district court, State and district of Louisiana, against E. E. Norton, assignee of Harlow J. Phelps, in bankruptcy, which action was discontinued December 1st, 1870, for the recovery of the eight lots sold to Harlow J. Phelps by John F. Clew; all of which will more fully appear from said petition in case No. 9163 of the said district court, made a part hereof.

16. On the 6th day of April, 1866, John F. Clew sold a certain
33 lot of ground in New Orleans, claimed as a part of the estate of Elizabeth Clew, to Henry C. Lymond, which act of sale was duly recorded on the 13th day of April, 1866, in the office of the register of conveyances.

17. It further appears that on the 19th day of May, 1870, the heirs-at-law made application to the second district court of the parish of Orleans to be recognized as such and placed in possession of the estate of Elizabeth Clew, deceased, and that the former orders of that court probating the will of Elizabeth Clew, appointing John F. Clew executor, and putting him in possession, &c., be revoked and annulled as unprovidently issued, to which proceedings the administrator of the succession of John F. Clew, deceased, and the att'y for the absent heirs therein were duly cited, as appears from petition and citation in case No. 15285, made part hereof.

18. On the 9th day of April, 1870, the succession of John F. Clew was opened in New Orleans by the public administrator, and
34 Joseph Duvigneaud, esq., was appointed to represent the absent heirs on May 16th, 1870, as will more fully appear from record marked "B," and made part hereof.

19. On the 29th day of June, 1870, judgment was rendered in the second district court of New Orleans revoking "the order of said court, rendered and signed January 25th, 1861, admitting to registry and execution the pretended last will and testament of Elizabeth Clew, and the order and judgment dated and signed March 29th, 1866, putting J. F. Clew in possession of the succession of Elizabeth Clew," and instead thereof recognising the present plaintiffs as heirs-at-law, and put-'ing them and their assignees in possession of the succession of Elizabeth Clew, deceased, as shown by said judgment made part hereof.

20. It appears in evidence that Albert Day and his wife, Lydia E. Day, sold their interest (¼) in the succession of Elizabeth Clew to James B. Taylor on the 30th day of July, 1864. (See deed made part
35 hereof.)

21. It also appears that Alfred R. Day, on the 25th day of October, 1864, sold his ¼ interest in the succession of Elizabeth Clew to James B. Taylor. (See deed made part hereof.)

22. It also appears that James B. Taylor and wife sold one-half of their interest in the succession of Elizabeth Clew acquired from Albert and Alfred Day to John E. Devlin. (See deed made part hereof.)

Additional.

1. The will of Elizabeth Clew, deceased, instituting John F. Clew sole and universal legatee, was probated in the 2d district court of New Orleans on 5th January, 1871. The legatee was confirmed and qualified as testamentary executor, administered as such, and, upon being finally discharged, was, by decree of the said probate court, put in possession of the estate of deceased, including the property in controversy.

2. The property in question was sold at auction as the individual property of John F. Clew, as inherited from the succession of
36 Elizabeth Clew, deceased; date of sale, 6th of April, 1866; and the sale was registered in the mortgage and conveyance office of New Orleans on the 11th April, 1866, previous to the registry of the deed or quit-claim from John F. Clew to the plaintiffs and other legal heirs of the deceased, Elizabeth Clew, which deed was recorded on the 2d day of May, 1866.

3. This deed or quit-claim from John F. Clew to said legal heirs, embracing all the rights, title, and int'rest of the said universal legatee, was made for the nominal sum of one dollar, but, by the plaintiffs' *pe*dicial admission in open court in a previous suit, the amount actual paid to John F. Clew was the sum of thirty thousand dollars, on consideration of which said Clew transferred to them all his titles and interest in the premises; but in the same petition containing the admission, they alleged that J. F. Clew never had any title or right whatever.

4. Said transfer was made by John F. Clew to said legal heirs
37 long previous to the decision rendered by the supreme court of New York setting aside, as revoked by testation during her lifetime, the will which had been probated in the surrogate court of New York and in the probate court of New Orleans. At the time of said decree, the said John F. Clew had parted with all his interest in the real estate of his deceased wife, Elizabeth Clew, in favor of those plaintiffs, as above stated.

5. In the proceedings in the 2d district court of New Orleans, to set aside the previous proceedings probating said will, (including the whole administration of said estate up to the discharge of the ex*ec*utor and his being put in possession as universal legatee,) were had without making party thereto the succession of Elizabeth Clew through an administrator, but the proceedings were had in her succession against the public administrator. Nor were the defendants and those through whom they claim made parties or notified; but the only parties were the administrator of the deceased, John F. Clew, whose succession was opened for that purpose.

38 The court (2d district) appointed an attorney to represent the absent heirs of the said John F. Clew; so that, so far as these defendants are concerned and the estate of Elizabeth Clew, deceased, the proceedings were ex parte, but the plaintiffs are the heirs-at-law of Elizabeth Clew.

(Signed.) WALLACE & HANDLIN,
Att'ys for Pl'ffs.

" AUG. DE B. HUGHES,
For Def'ts.

" A. VOORHEIS, *Att'y.*

On the foregoing facts I find for the defendants, and give judgment in accordance with said finding for the defendants, with costs.

(Signed) E. H. DURELL, *Judge.*

Document "C," refer'ed to in statement of facts offered by the plaintiffs.

Judgment rendered on the 16th day of November, 1866.

39 The people of the State of New York, by the grace of God free and independant, to all to whom these presents shall come or may concern, greeting:

Know de, that we have examined the records and files in the office of the clerk of the county of New York, and clerk of the supreme [SEAL.] court of said State for said county, do find a certain judgment roll there remaining, in the words and figures following, to wit:

Supreme court.

In the matter of proving the last will testament of Elizabeth Clew, deceased.

MARTHA JOSEPHINE DEVLIN, LAURA S. TAYLOR, Albert Day, and Alfred S. Day,
against
JOHN F. CLEW.

The return of the surrogate.

STATE OF NEW YORK,
County of New York, ss:

40 I, Edward C. West, surrogate of the county of New York, do hereby certify to the supreme court of the State of New York, that the annexed are correct copies of the petition, citation, will propounded, testimony, exhibits, notice of appeal, and bond of appeal on Martha Josephine Devlin, Albert Day, and Alfred R. Day; notice of appeal and bond on appeal of Laura S. Taylor, and the decision and decree appealed from, and other papers on file and of record in the office of the surrogate of the county of New York, in the matter proving the last will and testament of Elizabeth Clew, deceased, as a will of real and personal estate.

In testimony whereof I have hereunto set my hand and affixed my seal of office this day of , in the year of our Lord one thousand eighth undred and sixty-one, and of our Independence of eighty-fifth.

[L. S.] *Surrogate.*

41 *Petition for proof of will.*

COUNTY OF NEW YORK,
Surrogate Court:

To the surrogate of the county of New York:

The petition of John F. Clew, of the city of New York, respectfully showeth:

That your petitioner is an executor, named in the last will and testament of Elizabeth Clew, late of the county of New York, deceased; that

the said deceased was, at or immediately previous to her death, an inhabitant of the county of New York, and departed this life in said county on the fourth day of March inst., and that said will and testament relates to both real and personal estate, exceeding $5,000.

Your petitioner further shows, that the heirs and next of kin of said deceased, are Josephine Devlin, wife of John E. Devlin, severally residing at Brooklyn, Kings County, and State of New York; Laura Taylor, wife of James B. Taylor, severally residing in the city of New York;

Albert Day, residing at Royalton, Vermont; and Alfred Day,
42 residing at Baltimore, Maryland, the sisters and brothers of the testatrix, all of whom are of full age; that your petitioner is the surviving husband of the testatrix, and that she left no descendants, or father or mother, or children of any deceased brother or sister surviving.

Your petitioner therefore prays that the said last will and testament may be proved, and letters testamentary granted thereon according to law.

(Signed) JOHN F. CLEW.

CITY AND COUNTY OF NEW YORK, *ss:*

I, John F. Clew, the petitioner named in the foregoing petition, being duly sworn, do depose and say, that I have heard read the foregoing petition, to which I have subscribed my name, and know the contents thereof; and that the matter of facts therein stated are true; and that the matters therein stated of my information and belief, I believe to be true.

(Signed) JOHN F. CLEW.

Sworn this seventh day of March, A. D. 1859, before me.

(Signed) C. MINOR,
General Clerk of Surrogate.

43 *Order for citation.*

At a surrogate court, held in and for the county of New York, at the surrogate's office in the city of New York, on the seventh day of March, in the year 1859:

Present, Edward C. West, esquire, surrogate.

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

On reading and filing the petition of John F. Clew, propounding the last will and testament of said deceased, it is ordered that a citation issue to the heirs and next of kin of said deceased, returnable the twenty-fifth day of April next, at ten o'clock in the forenoon of that day.

Citation to the heirs and next of kin.

44 The people of State of New York, by the grace of God free and independent, to James B. Taylor and Laura his wife, severally residing in the State of New York; John E. Devlin and Josephine his wife, severally residing at Brookly', N. Y.; Albert Day, residing at Royalton, Vt.; and Alfred Day, residing at Baltimore, Md., the heirs and next of kin of Elizabeth Clew, deceased, send greeting:

Whereas, John F. Clew, of the city of New York, has lately applied to our surrogate of the county of New York, to have a certain instru-

ment in writing, relating to both real and personal estate, duly proved as the last will and testament of Elizabeth Clew, late of the city of New York, deceased;

Therefore you, and each of you, are cited to appear before our said surrogate, at his office in the city of New York, on the 25th day of April next, at ten o'clock in the forenoon of that day, then and there to attend to the probate of the said last will and testament.

In testimony whereof the surrogate of our said county has here-
45 unto affixed his seal of office the 7th day of March, one thousand eight hundred and fifty-nine.

[SEAL.] (Signed) EDW'D C. WEST,
Surrogate.

STATE OF NEW YORK,
City and County of Albany, ss:

George W. Quackenbush, of the city of Albany, being sworn, says: That he is a foreman in the office of the Evening Journal, the State paper, published in the city of Albany, and that the notice, of which the annexed is a printed copy, has been regularly published in the said Albany Evening Journal once in each week for six weeks successively, commencing on the tenth day of March, 1859.

(Signed) GEO. W. QUACKENBUSH.

Sworn to before me this 21st day of April, 1859.

(Signed) PH. TEN EYCK,
Commissoner of Deeds.

Citation to the heirs and next of kin.

46 The people of the State of New York, by the grace of God free and independant, to James B. Taylor and Laura his wife, severally residing in the city of New York; John E. Devlin and Josephin' his wife, severally residing at Brooklyn, N. Y.; Albert Day, residing at Royalton, Vt.; and Alfred Day, residing at Baltimore, Md., the heirs and next of kin of Elizabeth Clew, deceased, send greeting:

Whereas John F. Clew, of the city of New York, has lately applied to our surrogate of the county of New York to have a certain instrument in writing, relating to both real and personal estate, duly proved as the last will and testament of Elizabeth Clew, late of the city of New York, deceased;

Therefore you, and each of you, are cited to appear before our said surrogate, at his office in the city of New York, on the 25th day of April next, at ten o'clock in the forenoon of that day, then and there to attend to the probate of the said last will and testament.

In testimony whereof the surrogate of our said county has
47 hereunto affixed his seal of office the seventh day of March, one thousand eight hundred and fifty-nine.

[SEAL.] (Signed) EDW. C. WEST,
Surrogate.

CITY AND COUNTY OF NEW YORK, *ss:*

James Hays, of said city, being duly sworn, says: That he made personal service of the foregoing original citation on the following named persons, in said citation mentioned, by exhibiting to each of them

the said original citation, and delivering to each of them a copy thereof, as follows, that is to say: on the said John E. Devlin, on the 8th day of March, 1859, and on Josephine Devlin, by leaving a true copy at her place of residence, with a person of suitable age and discretion, who promised the deponent to deliver the same to her, she being sick, on the 8th day of March, 1859, and on the said James B. Taylor and Laura Taylor, by leaving a true copy at their residence, with a person of
48 suitable age and discretion, who promised the deponent to deliver the same to them on their return home, on the 8th day of March, 1859.

(Signed) JAMES HAYS.

Sworn to before me this 10th 10*th* day of March, 1859.

(Signed) TH'S G. VAN COTT,
Comm'r of Deeds.

The will.

I, Elizabeth Clew, wife of John F. Clew, of the city of New York, do make, declare, and proclaim this my last will and testament, as follows: I give, devise, and bequeath unto my beloved husband, John F. Clew, above named, all my property and estate, real and personal, of what nature or kind soever, to him, his heirs and assigns forever. I hereby request my said husband to aid and assist my relatives and connections, and to give them respectively, as he may see fit, such sums or portions as I would do were I alive, in distributing my property. I con-
49 stitute and appoint my said husband, John F. Clew, executor of this my last will and testament, hereby investing him with full power to sell and depose of all the property.

In testimony whereof, I have hereunto set my hand and affixed my seal this nineteenth day of December, A. D. 1851.

[L. S.] (Signed) ELIZABETH CLEW.

In presence of—
SAM'L P. KING,
F. CUNNINGHAM.

Subscribed and sealed by the testatrix in the presence of each of us, and then declared by her to be her last will and testament to each of us, who have each at her request hereto signed our names as witnesses, in her presence and in the presence of each other, and added our places of residence.

(Signed) SAM'L P. KING,
84 *DeGraw street, Brooklyn.*
" F. CUNNINGHAM,
No. 64 West 26th street, City of New York.

(The testimony and exhibits are to be found in the printed book returned herewith by the surrogate.)

50 *The surrogate's opinion.*

Surrogate's court.

In the matter, &c., of Elizabeth Clew.

DECEMBER 15th, 1860.

In this case I have arrived at the following conclusions:

First. The will propounded was executed in conformity with the stat-

ute, and is entitled to be admitted to probate as a will of real and personal estate, unless it was, after its execution, revoked by the testatrix.

Second. What is called the torn or the Purroy will is not proved even to have been executed.

Third. The Hall will was duly executed by the testatrix. I must, therefore, inquire how far the instrument propounded was revoked by this will, and for this purpose I must ascertain what the latter contained.

Fourth. I am satisfied that the will drawn by David P. Hall, esq., contained all the previous embraced in his memorandum,
51 (marked Ex. No. 1, May 18th.) Did it contain anything more?

The evidence of the witnesses examined as to its contents has failed to satisfy me that it did, and the circumstances which occurred at Mr. Hall's office lead my mind irresistibly to the conclusion that it did not. I think there can be no doubt that the will was drawn by Mr. Hall in accordance with the instructions noted in his memorandum, and was executed by Mrs. Clew, without having been altered in any respect.

Fifth. The Hall will was delivered by Mr. Hall to the testatrix. If it was afterwards left by her in custody of Miss Witheral, it was returned to her again before her death. The same witnesses who proved the delivery to Miss Witheral, proved the re-delivery to the testatrix. It does not appear to me that the destruction of the Hall will would have been advantageous to the parties who obtained possession of Mrs. Clew's papers after her death, nor is there any evidence tending to show that it was in existance at the time of her death. I must,
52 therefore, conclude that it was not among her papers at the time, and the presumption, therefore, is that it had been destroyed by her animo revocandi.

Sixth. The will propounded then was a valid will at the time of Mrs. Clew death, except as to the property which she sought to dispose of by the Hall will. As to that, it had been revoked, pro tanto.

(Signed) EDW. C. WEST,
Surrogate.

The decision of the surrogate.

At a surrogate's court, held in and for the county of New York, at the surrogate's office in the city of New York, on the 5th day of January, in the year one thousand eight hundred and sixty-one:

Present, Edward C. West, esq., surrogate.

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

54 On hearing proofs and the argument of counsel, Messrs. Bradford and Dean, having been heard in behalf of the proponent, and Mr. Stoughton having been heard in behalf of the contestants, and due deliberation having been thereupon had, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge, and decree, that the will of Elizabeth Clew, bearing date December nineteenth, one thousand eight hundred and fifty-one, (Dec. 19th, 1851,) and propounded for probate by John F. Clew, the sole executor therein named, be, and the same is hereby, admitted to probate and record as a valid will of real and personal estate, without prejudice to any questions that may arise in any other court as to the effect thereof upon the real estate of the testatrix at Hyde Park, in the State of New York, and that letters tes-

tamentary be issued thereon to the said John F. Clew, the proponent, as sole executor thereof.

(Copy) (Signed) EDW. C. WEST,
Surrogate.

54 *The appeal of Martha Josephine Devlin, Albert Day, and Alfred R. Day.*

COUNTY OF NEW YORK,
Surrogate's Court:

Before Edward C. West, esq., surrogate.

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

A decision having been rendered by Edward C. West, esq., surrogate of the county of New York, on the 5th day of January, 1861, in the above matter, in which it is ordered and adjudged as follows:

At a surrogate's court, held in and for the county of New York, at the surrogate's office in the city of New York, on the 5th day of January, in the year one thousand eight hundred and sixty-one:

Present, Edward C. West, esq., surrogate.

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

55 On hearing proofs and the argument of counsel, Messrs. Bradford and Dean having been heard in behalf of the proponents, and Mr. Stoughton having been heard in behalf of the contestant, and due deliberation having been thereupon had, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge, and decree, that the will of Elizabeth Clew, bearing date December nineteenth, (Dec. 19th, 1851,) and propounded for probate by John F. Clew, the sole executor therein named, be, and the same is hereby, admitted to probate and record as a valid will of real and personal estate, without prejudice to any questions that may arise in any other court as to the effect thereof upon the real estate of the testatrix at Hyde Park, in the State of New York, and that letters testamentary be issued thereon to the said John F. Clew, the proponent, as sole executor thereof.

(Copy.) (Signed) EDW. C. WEST,
Surrogate.

56 And Martha Josephine Devlin, a sister, and one of the heirs-at-law of the said Elizabeth Clew, deceased, and Alfred R. Day and Albert Day, brothers and heirs-at-law of the said Elizabeth Clew, hereby appeal, and each of them appeals, to the supreme court of the State of New York, from so much of the said decision as decides, orders, and adjudges that a certain instrument in writing, purporting to be the last will and testament of the said Elizabeth Clew, deceased, and bearing date the 19th day of December, 1851, and propounded for probate by John F. Clew, the sole executor therein named, be, and that the same was thereby, admitted to probate and record as a valid will of real and personal estate, and that letters testamentary be issued thereon to the said John F. Clew, the proponent, as sole executor thereof.

And that the said Martha Josephine Devlin, and Alfred R. Day, and

Albert Day, do, therefore, respectively pray, that the pleadings,
57 proofs, and proceedings may be transmitted to the supreme court, that such order may be had thereon as said court shall deem just.

Dated New York, January 5th, 1871.

(Signed) MARTHA JOSEPHINE DEVLIN,
By DAVID S. DRAPER, *Her Att'y.*
" ALBERT DAY,
By his attorney J. B. TAYLOR.
" ALFRED R. DAY,
By his attorney J. B. TAYLOR.

LUTHER R. MARSH,
Proctor and Counsel.

The appeal of Laura S. Taylor.

SURROGATE'S COURT,
County of New York:

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

Please to take notice, that Laura S. Taylor, wife of James B. Taylor, a sister, and one of the heirs-at-law of Elizabeth Clew, deceased,
58 appeals to the supreme court of the State of New York from the order or decree made in this matter by the surrogates of the county of New York, bearing date the fifth day of January, 1861, admitting to probate an instrument purporting to be the last will and testament of said Elizabeth Clew, deceased.

Dated 5th January, 1861.

(Signed) WALDO HUTCHINS,
Proctor for Laura S. Taylor, contestant.

To GILBERT DEAN, Esq.,
Proctor for John F. Clew, proponent, and
To THE SURROGATE *of the County of New York.*

Bonds of appeal.

Know all men by these presents, that we, Martha Josephine Devlin, of Number 72, Montague street, in the city of Brooklyn, and Albert Day, of Royalton, in the State of Vermont, and Alfred R. Day, of Baltimore, in the State of Maryland, and David S. Draper, residing at the Mansion House, Hicks street, in said city of Brooklyn, and James B.
59 Taylor, of Number 665 Broadway, in the city of New York, are held and firmly bound unto the people of the State of New York, or their assigns, in the penal sum of one hundred dollars, lawful money of the United States, to be paid to the said the people of the State of New York, or their assigns, and to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Whereas, Martha Josephine Devlin, sister, and one of the heirs-at-law of Elizabeth Clew, deceased, and Albert Day and Alfred R. Day, brothers, and heirs-at-law of said Elizabeth Clew, deceased, have appealed to the supreme court of the State of New York from a portion of the decision, order, and decree of Edward C. West, esquire,

surrogate of the county of New York, made and rendered on the fifth day of January, one thousand eight hundred and sixty-one:

Now, the condition of this obligation is such, that if the above-bounden Martha Josephine Devlin, Albert Day, and Alfred R. Day shall diligently prosecute the said appeal, and pay all such costs
60 as shall be taxed against them, in the event of their failure to obtain a reversal of that portion of said decision, order, and decree appealed from as aforesaid, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) MARTHA JOSEPHINE DEVLIN,
By DAVID S. DRAPER, *her Attorney.* [L. S.]
" ALBERT DAY,
By his attorney, J. B. TAYLOR. [L. S]
ALFRED R. DAY,
By J. B. TAYLOR, *his Attorney.* [L. S.]
D. S. DRAPER. [L. S.]
J. B. TAYLOR. [L. S.]

Signed and sealed in the presence of—
L. R. MARSH.

STATE OF NEW YORK,
City and County of New York, ss:

On this eighth day of January, 1861, before me personally came David S. Draper, and duly proved before me that he was the at-
61 torney in fact for Martha Joseph' Devlin, named in the foregoing instrument for the purpose therein mentioned; and also came before me, James B. Taylor, and duly proved before me that he was the attorney in fact for Albert Day and Alfred R. Day, respectively named in the foregoing instrument; the said Draper and Taylor being known to me to be the individuals described in, and who executed the preceding instrument, and severally acknowledged to me that they executed the same; the said Draper acknowledging to me that he so executed it individually, and also as such agent and attorney in fact for the said Martha Josephine Devlin; and, the said Taylor acknowledging to me that he so executed it individually, and as such agent and attorney in fact for said Albert Day and Alfred R. Day respectively.

(Signed) GEO. N. PRATT,
Comm'r of Deeds.

CITY AND COUNTY OF NEW YORK, *ss:*

62 James B. Taylor, being duly sworn, deposes and says: That he is a resident and householder within the city of New York, and worth the sum of two hundred dollars over and above all his liabilities, and except his property exempt from execution.

(Signed) J. B. TAYLOR.

Sworn to before me this 18th day of January, 1861.
(Signed) GEO. N. PRATT,
Comm'r of Deeds.

CITY AND COUNTY OF NEW YORK, *ss:*

David S. Draper, being duly sworn, deposes and says: That he is a resident and householder within the city of Brooklyn, and doing business as a merchant and householder within the city of New York, and

worth the sum of two hundred dollars over and above all his liabilities, and except his property exempt from execution.

(Signed) DAVID S. DRAPER.

Sworn to before me this 8th day of January, 1861.

(Signed) GEO. N. PRATT,
Comm'r of Deeds.

63 Know all men by these presents, that we, Laura S. Taylor, wife of James B. Taylor, of the city of New York, Owen W. Brennan, and Richard Mott, of the same place, are held and firmly bound unto the people of the State of New York in the sum of one hundred dollars, lawful money of the United States of America, to be paid to the said people of the State of New York, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this fifth day of January, one thousand eight hundred and sixty-one.

Whereas, the said Laura S. Taylor, a sister and one of the heirs-at-law of Elizabeth Clew, deceased, has appealed to the supreme court of the State of New York from an order or decree of the surrogate of the county of New York, bearing date the 5th day of January, 1861, admitting to probate as a will of real and personal estate an instrument purporting to be the last will and testament of said Elizabeth Clew:

64 Now, therefore, the condition of this obligation is such, that if the said appellant shall diligently prosecute said appeal, and shall pay all costs that may be adjudged against her by the said supreme court on said appeal, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) LAURA S. TAYLOR. [L. S.]
" O. W. BRENNAN. [L. S.]
" RICHARD MOTT. [L. S.]

CITY AND COUNTY OF NEW YORK, *ss:*

Owen W. Brennan, one of the subscribers to the foregoing bond, being sworn, says: That he is a freeholder and resident in the said city of New York, and is worth the sum of two hundred dollars over and above all his debts and liabilities, and besides property by law exempt from execution.

(Signed) O. W. BRENNAN.

Sworn before me this 5th day of January, 1861.

(Signed) W'M RIPLEY,
Not'y Pub.

65 CITY AND COUNTY OF NEW YORK, *ss:*

Richard Mott, one of the subscribers to the foregoing bond, being sworn, says: That he is a freeholder in the State of New York, and a resident of the city of New York, and is worth two hundred dollars over and above all his debts and liabilities, and besides property by law exempt from execution.

(Signed) RICHARD MOTT.

Sworn before me this 5th day of January, 1861.

(Signed) W'M RIPLEY, *Not'y Pub.*

CITY AND COUNTY OF NEW YORK, *ss:*

On this fifth day of January, A. D. 1861, before me came Laura S.

Taylor, Owen W. Brennan, and Richard Mott, to me known to be the individuals described in and who executed the foregoing bond, and acknowledges that they executed the same.

(Signed) W'M RIPLEY, *Not'y Public.*

66 *Petition of appeal of Martha Josephine Devlin, Albert Day, Afred R. Day, and Laura S. Taylor.*

Supreme court.

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

To the justices of the supreme court:

The petition of Martha Josephine Devlin, a sister, and one of the heirs-at-law of the said Elizabeth Clew, deceased, and Albert Day, and Alfred R. Day, brothers, and heirs-at-law of said Elizabeth Clew, and Laura S. Taylor, a sister, and one of the heirs-at-law of said Elizabeth Clew, deceased, respectfully shows, upon information and belief:

That heretofore, to wit, on the seventh day of March, 1859, at the city of New York, and before the surrogate of the city and county of
67 New York, John F. Clew, claiming to be the executor named therein, did propound for probate, as a will of real and personal estate, a certain instrument in writing, purporting to be the last will and testament of Elizabeth Clew, and bearing date the 19th day of December, 1851, and did demand that the said will should be received and admitted to probate as the last will and testament of the said Elizabeth Clew, deceased, and as a will of real and personal estate.

That, thereupon, all the heirs-at-law, and next of kin, of the said Elizabeth Clew were cited, by citation, issued by said surrogate, to attend the said probate, at a day and place therein mentioned.

That Martha Josephine Devlin, (wife of John E. Devlin, of the city of Brooklyn,) and Laura S. Taylor, (wife of James B. Taylor, of the city of New York,) sisters, respectively, and heirs-at-law of the said Elizabeth Clew, and Albert Day, of Royalton, Vermont, and Alfred R. Day, of Baltimore, Maryland, brothers, respectively, and heirs-at-law
68 of said Elizabeth Clew, deceased, were, as aforesaid, duly cited, as heirs-at-law and next of kin of the said Elizabeth Clew, deceased, to appear before the said surrogate to attend the said probate, at the day and place aforesaid.

That, at the said day and place, to wit, on the 25th day of April, in the year 1859, at the office of said surrogate, in the said city of New York, and before the said surrogate, your petitioners, the said Martha Josephine Devlin, Albert Day, Alfred R. Day, and Laura S. Taylor, did severally appear and attend by their several respective proctors and counsel in this behalf.

That the said several parties, by their aforesaid proctors and counsel, did appear and attend before the said surrogate, in the city of New York, on the said probate, on divers days, between the aforesaid 25th day of April, 1859, and the day of the final decision of the said surrogate on the matter of the said probate hereinafter mentioned.

That such proceedings were, therefore, had before the said surro
69 gate, that your petitioners, the said Martha Josephine Devlin, Albert Day, Alfred R. Day, and Laura S. Taylor did contest the said will and all and every part thereof, as the last will and testament of the said Elizabeth Clew, deceased, and did object to the same, and every part and

parcel thereof, being received and admitted to probate as a will of real and personal estate, or either of them, and did insist that the said instrument in writing, purporting to be the last will and testament of the said Elizabeth Clew, and bearing date as aforesaid on the 19th day of December, 1851, was, and had been, revoked during the lifetime of the said Elizabeth Clew, and that the same was, at the time of her death, null and void; and that the said Elizabeth Clew had died intestate; and the said proponent, John F. Clew, the husband, in her lifetime, of the said Elizabeth Clew, did claim and insist that the instrument in writing, pur-

70 porting to be the last will and testament of the said Elizabeth Clew, was the valid subsisting last will and testament of the said Elizabeth Clew, not revoked; and that she did not die intestate; that an issue being thus formed, the respective parties proceeded before the said surrogate with evidence, written and oral, on the part of the said parties so as aforesaid appearing on the said probate to sustain their respective allegations as aforesaid; that, after the said proof was taken and a hearing was had upon the matter before the said surrogate, a decision and decree was pronounced by him on the fifth day of January, 1861, by which it was decided and adjudged that the said instrument in writing, offered for probate as aforesaid, purporting to be the last will and testament of the said Elizabeth Clew, deceased, and bearing date the 19th day of December, in the year 1851, should be, and thereby was admitted to probate and record as a valid will of real and personal estate, without prejudice to any questions that may arise in any other court as to the effect thereof upon the real estate of the testatrix at Hyde Park, in the State of New York, and that letters testamentary

71 should be issued thereon to the said John F. Clew, the said proponent, as sole executor thereof.

And these appellants, your petitioners, being advised that the said decision and decree are erroneous in the respects therein appealled from, have appealed from those parts, and so much thereof as decides and decrees that the said instrument in writing offered for probate, purporting that the last will and testament of the said Elizabeth Clew, and bearing date December 19th, 1851, and propounded for probate by John F. Clew, the sole executor therein named, should be, and the same was thereby, admitted to probate and record as a valid will of real and personal estate, and as decides and decrees that letters testamentary be issued thereon to the said John F. Clew, the proponent as sole executor thereof.

And state, among other grounds of error therein, the following: That the said instrument in writing, so as aforesaid offered and admitted

72 to probate, purporting to be the last will and testament of Elizabeth Clew, deceased, and bearing date the 19th day of December, 1851, was not the last will and testament of the said Elizabeth Clew, and ought not to have been admitted to probate as a will of real and personal estate, or either of them, or to any extent; that the said last-named instrument had been, in the lifetime of the said Elizabeth Clew, revoked and cancelled by the said Elizabeth Clew, with the intention of revoking the same; that said last-named instrument should have been entirely rejected and disallowed by the surrogate, and of no force or validity, did not, and could not, appoint said John F. Clew the executor of the said Elizabeth Clew, and the decision of the surrogate was erroneous in deciding and decreeing that letters testamentary should issue to said John F. Clew.

Your petitioners, therefore, pray that the said John F. Clew may be required to answer this petition and that the proceedings and

decree in above matter in the surrogate's court may, upon this appeal, be reviewed in this court, and that the decision and decree
73 aforesaid may, for the errors aforesaid, and for other errors, be reversed, modified, or amended, as may be agreeable to equity, and that a day may be fixed for the said John F. Clew and these appellants to be heard on such appeal.

(Signed) MARTHA JOSEPHINE DEVLIN,
By DAVID S. DRAPER, *her attorney.*
" ALBERT DAY,
By his attorney J. B. TAYLOR.
" ALFRED R. DAY,
By J. B. TAYLOR, *his attorney.*
" LAURA S. TAYLOR.
" LUTHER R. MARSH,
Attorney and Counsel for
M. J. Devlin, Alber Day, and Alfred R. Day.

EDWIN W. STOUGHTON,
of Counsel.

W. HUTCHINS,
Att'y and Counsel for Laura S. Taylor.

CITY AND COUNTY OF NEW YORK, *ss:*

David S. Draper, of the city of Brooklyn, being sworn, says: That he has read the foregoing petition by the said Martha Josephine
74 Devlin, subscribed by this deponent as her attorney in fact, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein set forth on information and belief, and as to those matters he believes it to be true; and deponent says, that the reason why this affidavit is not made by the said Martha Josephine Devlin is, that she is, and for some months has been, absent from the State of New York, and is now in Italy; and this deponent is her attorney in fact in the premises, and is acquainted with the facts therein stated from conversations with Martha Josephine Devlin, and from reading the proceedings therein.

(Signed) DAVID S. DRAPER.

Sworn to before me this 8th day of January, 1861.
(Signed) GEO. N. PRATT,
Comm'r of Deeds.

CITY AND COUNTY OF NEW YORK, *ss:*

75 James B. Taylor, of said city and county, being duly sworn, says: That he has read the foregoing petition by the said Albert Day and Alfred R. Day, respectively, subscribed by this deponent as the agent and attorney in fact of the said Albert and Alfred R. Day respectively, and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are herein stated on information and belief, and as to those matters, that he believes it to be true; that the reason why this affidavit is not made by the said Albert Day and Alfred R. Day is, that the said Albert Day resides at Royalton, Vermont, and the said Alfred R. Day resides at Baltimore, Maryland, and are respectively absent from the State of New York, and deponent says that he is the attorney in fact of the said Albert and Alfred R. Day, in the premises, and is the husband of the said Laura S. Taylor, their sister, and one of the heirs-at-law of said Elizabeth Clew, deceased, and has given his personal attention to the conduct of

the proceedings on their part before said surrogate, and is per-
76 sonally acquainted with the facts set forth in the said petition.
(Signed) J. B. TAYLOR.

Sworn to before me this 8th day of January, 1861.
(Signed) GEO. N. PRATT,
Comm'r of Deeds.

CITY AND COUNTY OF NEW YORK, *ss:*

Laura S. Taylor, of said city, being duly sworn, says: That she has read the foregoing petition by her subscribed, and knows the contents thereof; that the same is true to her own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters she believes the same to be true.
(Signed) LAURA S. TAYLOR.

Sworn to before me this 10th day of January, 1860.
(Signed) JOHN H. PRATT,
Notary Public.

77 *Answer of John F. Clew.*

Supreme court.

CITY AND COUNTY OF NEW YORK:

MARTHA JOSEPHINE DEVLIN, ALBERT DAY, Alfred R. Day, and Laura S. Taylor, appellants,
against
JOHN F. CLEW, RESPONDENT.

To the justices of the supreme court:

The answer of John F. Clew, respondent, to the petition of appeal of the above-named appellants, respectfully shows: That this respondent admits that a decision and decree was pronounced by the surrogate of the city and county of New York, on the fifth day of January, 1861, by which it was decided and adjudged that the instrument in writing propounded for probate, on the seventh day of March, 1859, at the city of
New York, and before the said surrogate of the city and county
78 of New York, by the respondents herein, the said John F. Clew, and purporting to be the last will and testament of the said Elizabeth Clew, deceased, and bearing date the 19th day of December, 1851, should be, and thereby was, admitted to probate and record, as a valid will of real and personal estate, without prejudice to any questions that may arise in any other court as to the effect thereof upon the real estate of the testatrix at Hyde Park, in the State of New York, and whereby it was further decided that letters testamentary should be issued thereon to the said John F. Clew, the said proponent, as sole executor thereof, as set forth in the said petition of appeal.

And this respondents further says, on information and belief, that the said instrument in writing, so as aforesaid offered and admitted to probate, purporting to be the last and testament of Elizabeth Clew, deceased, and bearing date the 19th day of December, 1851, was the last
will and testament of the said Elizabeth Clew, and was rightfully
79 admitted to probate as a will of real and personal estate; that

said last-named instrument was not, in the life time of the said Elizabeth Clew, revoked or cancelled by the said Elizabeth Clew, with the intention of revoking the same; that the said last-named instrument was rightfully received and allowed by the said surrogate; that the said instrument was in full force and validity, and did appoint the said John F. Clew the executor of the said Elizabeth Clew, and this respondent is advised and believes and submits that said decision and decree of the said surrogate, so far as the same decides and decrees that said instrument in writing offered for probate by the respondent herein, John F. Clew, as the last will and testament of the said Elizabeth Clew, bearing date December nineteenth, 1851, should be, and that the same was thereby, admitted to probate and record as a valid will of real and personal estate, and as decides and decrees that letters testamentary
80 be issued thereon to the said John F. Clew, the proponent, as sole executor thereof, is without an error compained of by the said petition of appeal, and is just and agreeable to equity.

Said respondent therefore prays that the said decision and decree so made, as aforesaid, in the above matter in the surrogate's court, may, in all things, be sustained and affirmed, and that, as to those matters, the said petition of appeal may be dismissed by this honorable court, with costs to be adjudged to this respondent.

(Signed) GILBERT DEAN,
Att'y for Respondent.

81 *Opinion of the supreme court at general term.*

Supreme court.

In the matter of proving the last will, &c., of Elizabeth Clew.

MARTHA JOSEPHINE DEVLIN AND OTHERS, appellants,
against
JOHN F. CLEW, RESPONDENT.

FEBRUARY, GENERAL TERM, 1861.

Present, Clerke, Ingraham, and Southerland.

SOUTHERLAND, J. There is no question as to the due execution of the will, dated the 19th day of December, 1851, propounded by the respondent for probate; but the probate of that will was contested by the appellants, upon the ground that it had been revoked by the subsequent execution of Elizabeth Clew of two subsequent wills:
82 one alleged to have been executed about the 1st of September, 1853, expressly revoking all former wills; the other alleged to have been executed on the 16th day of December, 1856, containing an express clause of revocation, and devises and bequests so inconsistent with the provisions of the will or instrument propounded as thereby to revoke the same.

As to the alleged will or instrument, dated about the 1st September, 1853—called in the case the torn or Purroy will—if it was ever executed, there would seem to be no reasonable ground for doubting that it contained an express clause of revocation; and the material question before the surrogate as to it was whether it ever had been executed.

As to the will or instrument alleged to have been executed on the 16th day of December, 1856, called in the case the Hall will, the evidence would appear to leave no reasonable ground for questioning either

the sufficiency or formality of its execution or the facts of its loss,
83 so as to admit secondary evidence of its contents, and the material question before the surrogate as to it was: What was its provisions? Did they revoke the will offered for probate? Did it contain an express clause of revocation? If not, what were its provisions, devises, and bequests? How far were its provisions inconsistent with the will offered for probate?

On these questions, as to the two wills or instruments relied upon by the appellants as revoking the will propounded, there was much evidence before the surrogate which it would not be profitable to refer to in detail.

The surrogate arrived at the conclusion that the torn or Purroy will had not been proved ever to have been executed, and that the will drawn by David P. Hall, called the Hall will, contained all the provisions embraced in a certain memorandum of said Hall, (marked Exh. No. 1, May 18th;) but that it did not contain anything more.

84 There was a good deal of evidence to show that the Hall will contained not only an express clause of revocation, but other provisions not embraced in the memorandum of Hall, so inconsistent with the will propounded as to revoke it.

After a careful examination of the evidence before the surrogate, I am free to say that I do not find that preponderance of evidence on those questions in favor of the respondent which clearly justifies the conclusions at which he arrived, and, in my opinion, his decision admitting the will propounded by the respondent to probate as a valid will of real and personal estate should be reversed, on the ground of the conclusions at which the surrogate arrived on these questions of facts, and that an issue or issues should be made up to try these questions of fact by a jury.

In this case it appears to me that a jury is the appropriate tribunal to try these questions, and that no injustice can be done in reversing the decision below and awarding issues to be tried by a jury.

85 A copy. (Signed) JOHN CLANCY, *Clerk.*

Order of the general term of supreme court.

At a general term of the supreme court, held at the City Hall, in the city of New York, on the first Monday of February, A. D. 1861:

Present, Hon. T. W. Clerke, P. J.
" D. P. Ingraham, J.
" J. Southerland, J.

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

MARTHA JOSEPHIN DEVLIN, LAURA S. Taylor, and Alfred R. Day, appellants,
against
JOHN F. CLEW, RESPONDENT.

This appeal coming on to be heard, and after hearing Mr. E.
86 W. Stoughton, of counsel for the appellants, and Mr. Alexander W. Bradford, of counsel for the respondents, and mature deliberation having been thereupon had, it is ordered, adjudged, and decreed that the order, decision, or decree of the surrogate of the county of New York, in the above-entitled matter, bearing date the 5th day of

January, 1861, which decides, orders, and adjudges that a certain instrument in writing, purporting to be the last will and testament of the said Elizabeth Clew, deceased, and bearing date the 19th day of December, 1851, and propounded for probate by John F. Clew, the sole executor therein named, be, and that the same was thereby, admitted to probate and record as a valid will of real and personal estate, and that letters testamentary be issued thereon to the said John F. Clew, the proponent, as the executor thereof mentioned in the appeal of said appellants; and in their petitions of appeal be, and the same is hereby, in all things reversed.

And it is further ordered, that the following questions of fact
87 be tried between the parties by a jury of the country, at the next circuit court to be held in and for the city and county of New York, to wit:

First issue. Whether the instrument in writing, purporting to be the last will and testament of Elizabeth Clew, deceased, bearing date the 19th December, 1851, was duly executed as her last will and testament.

Second. Whether the said instrument was ever revoked, in whole or in part, and which? and if only in part, then to what extent?

(Signed) JOHN CLANCY,
A copy. *Clerk.*

At a special term, New York City, November 2d, 1866:
Present, Hon. G. G. Barnard, justice.

Supreme court.

In the matter of proving the last will, &c., of Elizabeth Clew.

MARTHA JOSEPHINE DEVLIN, LAURA S. TAYLOR, Albert Day, and Alfred R. Day
against
88 JOHN F. CLEW.

On reading and filing the affidavit of Luther R. Marsh herein, and on reading other papers in this proceeding and cause, and on hearing said Marsh, of counsel for said appellants and contestants, and on hearing Gilbert Dean, the former attorney of said John F. Clew, deceased, herein, at the time of his death, and also the attorney for Philomena M. Clew, the executrix of the said John F. Clew, it is ordered that this action, proceeding, and appeal be continued in the name of said Martha Josephine Devlin, Laura S. Taylor, and Albert Day, as appellants and contestants, and against said Philomena M. Clew, as executrix of John F. Clew, deceased, as defendant.

A copy. (Signed) W'M C. CONNER, *Clerk.*

Supreme court.—Circuit.

ALBERT DAY ET AL.
against
89 PHILOMENA M. CLEW ET AL.

November 15th, 1866.—Present, Hon. Joseph Mullen, justice.

I hereby certify that this cause was this day tried by the court and a jury, and a verdict rendered therein for the plaintiff by the direction of the court, as follows:

First. The instrument in writing, purporting to be the last will an

testament of Elizabeth Clew, deceased, bearing date 19th day of December, 1851, was duly executed by her as her last will and testament.

Second. The said instrument last named, dated December, 1851, was after its execution wholly revoked by the said Elizabeth Clew.

(Signed) W'M C. CONNER, *Clerk.*

At a special term of the supreme court held at the City Hall, in the city of New York, on the 16th day of November, 1866:

90 Present, Hon. Joseah Sutherland, justice.

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

MARTHA JOSEPHINE DEVLIN, LAURA S. Taylor, and ALBERT DAY
against
PHILOMENA M. CLEW, EXECUTRIX OF John F. Clew, deceased.

The said John F. Clew having, on the 7th day of March, 1859, presented to the surrogate of the county of New York a certain instrument in writing, bearing date the 19th day of December, 1851, and hereinbefore set forth, purporting to be the last will and testament of his said wife Elizabeth Clew, deceased, which alleged will was so presented to said surrogate for probate; and the said surrogate thereupon

91 having, on said 7th day of March, 1859, made an order that a citation issue to the heirs and next of kin of said Elizabeth Clew, deceased, returnable on the 25th day of April then next, and having issued his citation pursuant to said order to, and served the same upon, said heirs and next of kin, which said order and citation are hereinbefore set forth; and the said heirs and next of kin of the said Elizabeth Clew, deceased, to wit, the above named Martha Josephine Devlin, Laura S. Taylor, and Albert Day, the sisters and brother of said Elizabeth, together with Alfred R. Day, another brother of said Elizabeth, and since deceased, appeared before said surrogate pursuant to said citation, and contested the probate of said alleged will; and thereupon, on due trial had before said surrogate, he having rendered his decision on the 15th December, 1860, and made his decree thereupon on the 5th day of January, 1861, by which he ordered, adjudged, and decreed that said will, so propounded, should be admitted to probate and

92 record, without prejudice to any questions that might arise as to its effect upon real estate of the testatrix at Hyde Park, in the State of New York, and that letters testamentary be issued to said John F. Clew thereon, which said decision and decree are hereinbefore set forth.

And the said Martha Josephine Devlin, Laura S. Taylor, Albert Day, and Alfred R. Day, said contestants, having respectively duly appealed to this court from the said order or decree of said surrogate, and given adequate bond on said appeal, which said petitioners of appeal, notices of appeal, and bonds thereon given, are hereinbefore set forth; and the said John F. Clew, by Gilbert Dean, his attorney, having put in his answer to said appeal, and the said appeal thereafter coming on to be heard at a general term of this court, held before Judges Clerke, Ingraham, and Sutherland, justices of this court, and having been duly argued and submitted, and this court, at said general term, held in February, 1861, having upon due deliberation pronounced an

93 opinion and rendered a decision therein, reversing said order, decision, and decree of said surrogate, in all things, and ordering that the following questions of facts be tried by a jury of the county at the then next circuit court to be held for the city and county of New York, (that being the county where the said surrogate's decision was made,) to wit:

First issue. Whether the said instrument in writing, purporting to be the last will and testament of Elizabeth Clew, deceased, bearing date 19th of December, 1851, was duly executed as her last will and testament.

Second issue. Whether the said last-mentioned instrument was ever revoked in whole or in part, and which; and if only in part, then to what extent; which said opinion and order of said general term are hereinbefore recited.

And thereafter, and before the trial of said issue, the said John F. Clew, the above-named proponent, and the said Alfred R. Day, one of the above-named contestants, having, respectively, departed this
94 life; and the said John F. Clew having left a last will and testament, by which he appointed his wife, Philomena M. Clew, sole executrix thereof; and said last-named will having been duly admitted to probate by the surrogate of the county of New York, and letters testamentary issued by him thereon to said Philomena M. Clew, as such executrix; and this court having, at a special term thereof, ordered that the said appeal, proceeding, and cause be continued in the name of said Martha Josephine Devlin, Laura S. Taylor, and Albert Day, as appellants and contestants, and against said Philomena M. Clew, as executrix of said John F. Clew, deceased, as defendant, which order last named is hereinbefore set forth.

And the said issues so awarded duly coming on to be heard at a circuit court held in and for the city and county of New York, at the City Hall thereof, before the honorable Joseph Mullin, one of the justices of this court, and a jury, on the 15th day of November, 1866; and
95 Luther R. Marsh, esq., appearing for the said Martha Josephine Devlin, Laura S. Taylor, and Albert Day; and Gilbert Dean, esq., appearing for said Philomena M. Clew, executrix as aforesaid, and said cause, proceeding, and action thereupon, being tried, witnesses examined, and said counsel heard, and the said cause and issues being then submitted to the jury, under the charge of said justice to them made, said issues in and by which they did find and determine upon said first issue that the instrument in writing therein mentioned, purporting to be the last will and testament of Elizabeth Clew, deceased, bearing date the 19th December, 1851, was duly executed as her last will and testament; and upon said second issue said jury did find, determine, and render their verdict, that said last-named instrument, to wit, the said last will and testament of said Elizabeth Clew, deceased, bearing date the 19th December, 1851, was by her duly and wholly revoked.

96 Thereupon this court doth order, adjudge, and decree, on motion of Luther R. Marsh, esq., of counsel for said contestants, that said last will and testament of said Elizabeth Clew, deceased, dated December 19th, 1851, and propounded as aforesaid for probate, was wholly revoked, and that the said Elizabeth Clew died intestate.

[Endorsed:] Filed December 1st, 1866.

All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness, D. P. Ingraham, justice, at the city of New York, the 5th day

of December, in the year of our Lord one thousand eight hundred and sixty-six, and of our Independence ninety-first.

(Signed) W'M C. CONNER, *Clerk.*

I, D. P. Ingraham, presiding justice of the supreme court of the
97 State of New York, for the city and county of New York, do hereby certify that William C. Conner, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York, and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts; I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, December 5, 1866.

(Signed) D. P. INGRAHAM, *Justice.*

STATE OF NEW YORK,
City and County of New York:

I, William C. Conner, clerk of the supreme court of said State, in and for the city and county of New York, do hereby certify that D. P. Ingraham, whose name is subscribed to the preceding certificate, is
98 residing justice of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 5th day of December, 1866.

[SEAL.] (Signed) WILLIAM C. CONNER, *Clerk.*

Document "D" refer'ed to in statement of facts.

Offered in the statement of facts by the plaintiffs.

SURROGATE'S COURT,
County of New York:

In the matter of proving the last will, &c., of Elizabeth Clew, deceased.

Exemplified copy of surrogate's decree, annulling and revoking
99 record and probate of will and decree of January 5th, 1861.

LUTHER R. MARSH, *Proctor.*

At a surrogate's court held in and for the county of New York, at the surrogate's office in the city of New York, on the 6th day of December, in the year 1866:

Present, Hon. Gideon J. Tucker, surrogate.

In the matter of proving the last will and testament of Elizabeth Clew, deceased.

On reading and filing notice of motion for this day and admission of service thereof, and also the certified copy of a judgment of the supreme court herein, made and granted on the 16th day of November instant, whereby, after reciting the proceedings heretofore had in this court in this matter and the order and decree of this court therein
100 made and granted on the 5th day of January, 1861, by Edward C. West, esq., the surrogate of the county of New York, by which a certain instrument which had been propounded for probate as the last

will and testament of said Elizabeth Clew, deceased, bearing date December 19th, 1851, was admitted to probate and record as a valid will of real and personal estate, and decreeing further that letters testamentary be issued thereon to the said John F. Clew, the proponent, as sole executor thereof; and further reciting that said order and decree had been appealed from to the supreme court, and, after due hearing thereon, that said order and decree were reversed by the general term of said supreme court in February, 1861, and certain issues ordered to be tried by a jury of the county of New York; and amongst them the issue whether the said instrument, so propounded for probate, has been revoked, and also reciting that said issues had come on to be tried pursuant to said decision at a circuit court held for the city and county of New York on the 15th day of November, 1866, and that said
101 instrument, dated December 19, 1851, so propounded for probate, was, on said trial, found by said jury to have been, after its execution, wholly revoked by the said Elizabeth Clew, and said judgment of said supreme court so certified, after above recitals, among others, did order, adjudge, and decree, that the said last will and testament of said Elizabeth Clew, deceased, dated December 19th, 1851, and propounded as aforesaid for probate, was wholly revoked, and that the said Elizabeth Clew died intestate.

And thereupon, on hearing Luther R. Marsh, esq., for the contestants, and Gilbert Dean, esq., for the proponents and his representatives Philimena M. Clew, executrix, mentioned in said judgment, it is ordered, adjudged, and decreed, that the judgment of the supreme court of 16th of November, 1866, be the judgment of this court; and pursuant to said judgment and the statute in such case made and provided, that the said order, judgment, and decree of this court herein, dated on said 5th day of January, in the year 1861, admitting said instrument of Decem-
102 ber 19th, 1851, to probate and record as a valid will of real and personal estate, and ordering, adjudging, and decreeing that letters testamentary be issued thereon to the said John F. Clew, the proponent, as sole executor thereof, be, and the said order and said record and probate of said instrument of the 19th December, 1851, hereby are, annulled and revoked.

(Signed) GIDEON J. TUCKER,
Surrogate.

STATE AND COUNTY OF NEW YORK,
Surrogate's Office, ss:

I, William W. Smith, clerk to the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the decree in the matter of the estate of Elizabeth Clew, deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof, I have hereunto set my hand, and affixed
103 the seal of office of said surrogate, this 7th day of December, in the year of our Lord one thousand eight hundred and sixty-six, and of our Independence the ninety-first.

[SEAL.]

(Signed) WILLIAM W. SMITH,
Clerk to the Surrogate's Court.

Int. rev. stamp, 5 cts.]

STATE AND COUNTY OF NEW YORK,
Surrogate's Office, ss:

I, Gideon J. Tucker, surrogate of said county and presiding magistrate of the surrogate's court, do hereby certify that the foregoing exemplification of the decree in the matter of the estate of Elizabeth Clew, deceased, is authenticated in due form and by the proper officer.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the surrogate's court, this 7th day of December, in the year of our Lord one thousand eight hundred and sixty-six, & of our Independence the ninety-first.

[SEAL.] (Signed) GIDEON J. TUCKER, *Surrogate.*

[Int. rev. stamp, 5 cts.]

104 *Document "A," referred to in statement of facts.—Offered in the statement of facts by the plaintiffs.*

No. 15285.

Second district court for the parish of Orleans.

STATE OF LOUISIANA,
Second district court for the parish of Orleans:

SUCCESSION *of* MRS. ELIZABETH DAY, DECEASED WIFE OF J. F. Clew. } No. 15285.

Petition of A. F. Cochran for curatorship & publication.—Filed March 19, 1859.

To the honorable the second district court of New Orleans:

105 The petition of Asa F. Cochran, a resident of this city, respectfully shows:

That Elizabeth Day, the wife of J. Ferdinand Clew, a resident of the State of New York, departed this life on the 4th instant; that she died intestate, and left property in this State; that her estate is vacant.

Petitioner shows that he was the friend of the deceased during her life, and is entitled to the administration of her estate.

Wherefore he prays that this his application be duly advertised, and after due proceedings had, that he be confirmed in the office of curator of said estate, and for general relief.

(Signed) BONFORD, SINGLETON & CLARK,
Att'ys for Petitioner.

Affidavit annexed to foregoing petition.

Personally appeared Asa F. Cochran, who, being duly sworn, deposes and says: That he is informed by letters received from the intimate friends and relatives of the said Mrs. Elizabeth Clew, that she de-
106 par ed this life on the 4th instant, and he has no doubt of the correctness of said information.

(Signed) A. F. COCHRAN.

Sworn to and subscribed before me March 19th, 1859.

(Signed) C. M. BANDFORT, *J. P.*

Order of court endorsed on foregoing petition.

Let petitioner's application for letters of curatorship in this estate be advertised according to law.

New Orleans, March 21st, 1859.

(Signed) P. H. MORGAN, *Judge.*

Opposition of John F. Clew.—Filed March 25th, 1859.

Second dist. court of New Orleans.

SUCCESSION of ELIZABETH DAY, DECEASED WIFE OF John F. Clew. } No. 15285.

And now comes into court John F. Clew, surviving husband of the late deceased, and makes opposition to the application of Asa F.
107 Cochran herein to be appointed curator of the estate of the said deceased, and for ground of opposition respectfully represents, that it is not true, as stated in said application, that the said deceased died intestate; that she made a will in due form of law, by which this opponent is constituted her universal legatee, which said will was in the city of New York, the place of said decedent's residence at the time of her death, and will in due time be presented to this honorable court for probate.

Wherefore, this opponent prays that the said application of the said Asa F. Cochran be rejected at his own costs, and for general relief.

(Signed) BENJAMIN, BRADFORD & FINNEY,
Of Counsel.

Second dist. court of New Orleans.

Supplemental petition of Asa F. Cochran.—Filed April 13th, 1859.

SUCCESSION of ELIZABETH CLEW, DECEASED. } No. 15285.

108 To the honorable the judge of the secon district court of New Orleans:

The supplemental petition of Asa F. Cochran, a resident of this city, respectfully shows:

That, since he applied for the curatorship of the estate of said deceased, he has been duly constituted the agent and attorney in fact of Laura S. Taylor, Martha Josephine Devlin, Albert Day, and Alfred R. Day, the sole heirs-at-law of the said deceased, with full power to take charge and administer the estate of Mrs. Clew, deceased, as will appear by reference to the annexed powers of attorney, made a part of this petition.

That your petitioner, as agent and attorney in fact of all the heirs of said deceased, with full power and authority to represent their interest to in *in* said estate, is entitled to the same in preference to the surviving husband of the said Mrs. Clew.

That the deceased left large possessions in this city wh ch re-
109 quire the immediate attention of an administration.

That the pretended last will and testament of the deceased, under which the surviving husband claims said estate and has opposed the application of this petition for the curatorship of said estate, is now in litigation in the State of New York, the residence of the deceased, and its validity as a last will and testament is denied, and it is not now possible to ascertain when the said litigation shall be finally decided, and in the mean time the estate of said Mrs. Clew, located in this city, will be liable to be lost, injured, or damaged, unless properly administered under the direction and control of this honorable court.

Wherefore petitioner prays that this supplemental petition be filed, that this his application for the administration of said estate be duly advertised, and after all due proceedings that he be confirmed in the office of administrator of said estate, and for general relief.

(Signed) BRADFORD, SINGLETON & CLARK.
Att'ys for Petitioner.

110 *Order of court endorsed on foregoing petition.*

Let this supplemental petition be filed and let petitioner's application for letter of administration in this estate be advertised, according to law.

New Orleans, April 13th, 1859.

(Signed) P. H. MORGAN,
Judge.

Receipt for the powers of attorney mentioned in the foregoing petition (sup.) and endorsed on the first petition.

Received May 29th, 1859, of the clerk of the second district court, the two powers of attorney from the heirs to A. F. Cochran, filed in this succession.

(Signed) BRADFORD, SINGLETON & CLARK,
By ERNEST DAVIS.

Opposition of John F. Clew, filed April 23, 1859.

Second dist. court of New Orleans.

SUCCESSION *of* ELIZABETH CLEW. } No. 15285.

111 The opposition of John F. Clew, of the city of New York, surviving husband and universal legatee of the deceased Elizabeth Clew, to the supplemental petition herein filed on the 13th April, 1859, by Asa F. Cochran, praying to be appointed administrator of the said deceased, respectfully showeth: That this opponent denies that the said decedent died intestate, and that Laura S. Taylor, Martha Josephine Devlin, Albert Day, and Alfred R. Day, are heirs-at-law of the decedent. This opponent denies that the said decedent died intestate; on the contrary he avers that the said deceased died in the State of New York, where she was then domiciled, having first made her will in that State in due form of law, the original whereof has been presented for probate to the surrogate of the county of New York, State of New York, and is on file among the archives and records of his office, and, this deponent is advised, cannot be withdrawn therefrom.

This opponent was constituted universal legatee of said decedent by the said will.

This opponent files herewith his petition praying for the pro-
112 bate of said will and a copy thereof.

Wherefore this opponent prays that the application of said Cochran be rejected at his own costs, and opponent prays for all general and equitable relief.

(Signed) BENJAMINE, BRADFORD & FINNEY,
Atty's.

Petition for probate of will and for a commission, filed with foregoing opposition.

Seconed dist. court of New Orleans.

SUCCESSION *of* ELIZABETH CLEW. } No. 15285.

This petition of John F. Clew, who resides in the city of New York, in the State of New York, respectfully represents: That his wife Elizabeth Clew departed this life on the 4th day of March, 1859, as will appear by the proof already filed in this record; that at the time of her death she was a resident and citizen of the State of New York.

113 That prior to her death, viz: on 19th December, 1851, she made her last will and testament in the State of New York, in the form prescribed by the laws of that State; that by her said will she has given, bebequeathed and to petitioner all her estate, real and personal, and constituted him her executor.

That the original of said will has been presented for probate to the surrogate of the county of New York, in the State of New York, which application is still pending, and, as petitioner is advised, the said original cannot be withdrawn from the office of the said surrogate in whose custody it remains.

That the said deceased left real estate and assets in this State, the principal part of which is situated in this parish. Petitioner herewith files a copy of said will.

Wherefore petitioner prays that a commission may issue to any Louisiana commissioner in the State of New York, to take the testimony of Samuel P. King, I. Cunningham, A. W. Bradford and others,
114 concerning the execution and validity of said will, to be received in evidence on the probate thereof; that in due course of law the said will be admitted to probate and ordered to be executed and enregistered, and that letters testamentary be delivered to petitioner, and for all general and equitable relief.

(Signed) BENJAMINE, BRADFORD & FINNEY,
Att'ys.

Affidavit annexed to foregoing petition.

Personally came and appeared before me the undersigned authority, John Finney, who, being duly sworn, declared: That he is duly authorized as attorney-at-law to present the foregoing petition and to represent the petitioner, John F. Clew, in the proceeding thereby initiated; that said Clew is absent from this State; that Samuel S. King, F. Cunningham, and Alex. W. Bradford, are material witnesses for the said John F.

Clew to prosecute the will of Elizabeth Clew, as prayed in the foregoing petition; that said witnesses reside out of this State, and, as
115 affiant is informed, in or near the city of New York, State of New York.

(Signed) JOHN FINNEY.

Sworn to and subscribed before me this 23d April, 1859.

(Signed) OCTAVE MOREL,
D'y Clk.

Order of court endorsed on foregoing petition.

Let a commission issue directed to any Louisiana commissioner in the State of New York, to take the testimony of Samuel P. King, F. Cunningham, and A. W. Bradford & als, for the purpose within mentioned.

NEW ORLEANS, 23*d April*, 1859.

(Signed) P. H. MORGAN,
Judge.

Intervention of John M. Demarest.—Filed May 21st, 1860.

Second district court of New Orleans.

SUCCESSION of WIFE OF JOHN F. CLEW. } No. 15285.

116 The intervention of John M. Demarest, who resides in this city, respectfully shows: That on the 19th of March, 1859, this succession was opened in this honorable court, and A. F. Cochran, of this city, made application for letters of administration upon her estate, which application was opposed by John F. Clew, surviving husband of the deceased, and all of which remain undecided, and this estate without a representative, to the great prejudice of the creditors, and specially of respondent, who in his capacity of datine testamentary executor of Samuel Brown, has the unsatisfied judgment of this honorable court against the said deceased Mrs. Elizabeth Clew for five thousand dollars, with a large amount of accrued interests.

Wherefore petitioner prays leave to intervene and oppose both the aforesaid applicants for the administration of this succession; that petitioner's pretentions to be office be sustained; that he be appointed administrator of this succession on complying with all the requisites of law, with general relief.

(Signed) DURAND & HORNER,
Att'ys for Petitioner.

117 *Order of court endorsed on foregoing intervention.*

Let this petition of intervention and third opposition be filed.

New Orleans, 21st May, 1860.

(Signed) P. H. MORGAN,
Judge.

Order case continued as entered on the minutes Nov. 16th, 1860.

Second district court of New Orleans.

SUCCESSION *of* ELIZABETH CLEW, WIFE OF J. F. CLEW. } No. 15285.

This case came on to-day for trial. Bradford, Singleton & Clark for the estate; Benjamine, Bradford & Finney for opponent; Durand & Horner for intervenor.

When, after hearing argument of counsel, it is ordered that this case be continued to this day four weeks.

118 *Letter of J. F. Clew.—Filed December 21st, 1860.*

NEW YORK, *December 15th*, 1860.

Mess's BENJAMIN, BRADFORD & FINNEY, *New Orleans:*

DEAR SIRS: I have telegraphed you this day that the surrogate admitted the will of late Mrs. C. to probate as a will of real and personal property, and Monday next (17th) I will send you certificate of probate, and I expect to be able to leave for New Orleans toward the latter part of this month. Please communicate the present to Mess'rs E. Rochereau & Co., and oblige your,

(Signed) J. F. CLEW.

Order case continued as entered on the minutes December 21, 1860.

Second district court of New Orleans.

SUCCESSION *of* ELIZABETH CLEW, WIFE OF J. F. CLEW. } No. 15285.

119 This case, fixed for to-day, was called and ordered to be continued with preference.

Order case continued as entered on the minutes January 18, 1861.

Second dist. court of New Orleans.

SUCCESSION *of* ELIZABETH CLEW, WIFE OF J. F. CLEW. } No. 15285.

The opposition herein, fixed for to-day, was called and ordered to be continued to Friday, January 25, 1861.

Letter of J. F. Clew.—Filed January 18th, 1861.

NEW YORK, *January 6th*, 1861.

DEAR SIRS: Since my last I have been detained on account of the sickness of the surrogate, who was unable to attend court. Yesterday his decree in one case was entered, and I enclose from the N. Y. Herald of this day a correct copy; to-morrow I will have all the papers

120 ready, and call at Washington to have all certified according to the act of Congress herein. I will proceed by the way of the Virginia and Tennessee C. R. R.

Yours, very truly,

(Signed) J. F. CLEW.

Mess'e's BENJAMIN, BRADFORD & FINNEY, *New Orleans.*

P. S.—For decree mentioned in foregoing letter, see pages

Supplemental petition of J. F. Clew to file will and probate.—Filed January 25, 1861.

Second dist. court of New Orleans.

SUCCESSION *of* ELIZABETH CLEW, DEC'D. } No. 15285.

The supplemental petition of J. F. Clew respectfully represents: That, since the filing of his original petition praying that the last will and testament of Elizabeth Clew, deceased, be admitted to probate, the said last will and testament has been admitted to probate by court of
121 the surrogate of the city of New York, all of which will more fully appear by reference to duly authenticated copy of the said will, and of the probate thereof herewith filed; that the said will appoints this petitioner sole executor, and constitutes him universal legatee of all the estate of said decedent.

Wherefore petitioner prays that said will be admitted to probate, ordered to be executed; that petitioner be ordered to qualify as executor thereof; an inventory may be ordered to be taken by a notary of this parish of all the property and effects of the decedent; that, in due course of law, letters testamentary may be issued to petitioner, and for all general and equitable relief.

(Signed) BENJAMIN, BRADFORD & FINNEY, *Atty's.*

Last will and testament of Elizabeth Clew, referred to in foregoing petition and proof.—Filed January 25, 1861.

I, Elizabeth Clew, wife of John F. Clew, of the city of New York,
122 do make, declare, and proclaim this, my last will and testament, as follows:

I give, devise, and bequeath unto my beloved husband, John F. Clew, above named, all my property and estate, real and personal, of which nature or kind soever, to him, his heirs, and assigns forever.

I hereby request my said husband to aid and assist my relatives and connections, and to give to them, respectively, as he may see fit, such sums or portions as I would do were I alive in destributing my property.

I constitute and appoint my said husband, John F. Clew, executor of this, my last will and testament, hereby investing him with full power to sell and dispose of all the property.

In testimony whereof I have hereunto set my hand and fixed my seal this nineteenth day of December, A. D. 1851.

(Signed) ELIZABETH CLEW.

In presence of—

(Signed) SAM'L KING.
F. CUNNINGHAM.

Subscribed and sealed by the testatrix in the presence of each
123 of us, and then declared by her to be her last will and testament, to each of us, who have each, at her request, signed our names, in the presence of each other, and added our place of residence.

(Signed) SAM'L P. KING,
84 *Degraw St., Brooklyn.*
" F. CUNNINGHAM,
64 *West 26 St., City of New York.*

Probate of will.

STATE AND COUNTY OF NEW YORK,
Surrogate Office, ss:

I, Edward C. West, surrogate of said county, and acting as clerk of the surrogate's court, do hereby certify that I have compared the foregoing paper with an original propounded for probate as the last will and testament of Elizabeth Clew, deceased, and now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original.

124 In testimony whereof I have hereunto set my hand and affixed my seal of office this 10th day of January, in the year of our Lord one thousand eight hundred and sixty-one, and of our Independence the eighty-fifth.

[SEAL.] (Signed) EDWARD C. WEST, *Surrogate.*

STATE AND COUNTY OF NEW YORK,
Surrogate Office, ss:

I, Edward C. West, surrogate of said county and presiding magistrate of said surrogate court, do hereby certify that the foregoing exemplification is authenticated in due form.

(Signed) EDWARD C. WEST, *Surrogate.*

Decree.

A the *the* surrogate's court, held at the city of New York, on the 5th day of January, 1861:

Present, Hon. Edward C. West, surrogate.

125 In the matter of proving the last will and testament of Elizabeth Clew, deceased.

On hearing proofs, and the arguments of counsel, Messrs. Bradford and Dean, having been heard in behalf of the proponent, and Mr. Stoughton having been heard on behalf of the contestants, and due deliberations having been thereupon had, it is ordered, adjudged, and decreed that this court, by virtue of the power and authority therein vested, doth order, adjudge, and decree that the will of Elizabeth Clew, bearing date December nineteenth, one thousand eight hundred and fifty-one, (December 15th, 1851,) and propounded for probate by John F. Clew, the sole executor therein named, be, and the same is hereby, admitted to probate and recorded as a will of real and personal estate, without prejudice to any questions in any other court as to the effect thereof upon the real estate of the testatrix at Hyde Park, in the State of New York, and that letters testamentary be issued thereon.

126 STATE AND COUNTY OF NEW YORK,
Surrogate Office, ss:

I, Edward C. West, surrogate of said county, and acting as clerk of the surrogate's court, do hereby certify that I have compared the following copy of a decree with an original thereof, dated the 5th day of January, 1861, now remaining in this office, and have found the same to be a correct transcript thereof, and of the whole of such original; and I further certify than an appeal has been taken from said decree to the supreme court of the State.

In testimony whereof I have hereunto set my hand and affixed the seal of office this 10th day of January, in the year of our Lord one thousand eight hundred and sixty-one, and of our Independence the eighty-fifth.

[SEAL.] (Signed) EDWARD C. WEST, *Surrogate.*

127 STATE AND COUNTY OF NEW YORK,
Surrogate's Office, ss:

I, Edward C. West, surrogate of said county and presiding magistrate of the surrogate's court, do hereby certify that the foregoing exemplification is authenticated in due form.

[SEAL.] (Signed) EDWARD C. WEST,
Surrogate.

Order of court endorsed on foregoing petition for execution and registration of last will and testament, &c.

Let the last will and testament of the deceased, of which the accompanying is an authentic copy, be approved, registered, and executed. Let the petitioner be confirmed as the testamentary executor of the deceased, and let the inventory within prayed for be made by Theodore Guyol, esq., not. pub., in the presence of all parties interested, or them duly called. Let E. V. Wiltz and A. Morel be appointed and
128 sworn as appraisers to value the property to be duly inventoried.

New Orleans, January 25, 1861.

(Signed) P. H. MORGAN, *Judge.*

Oath of executor.—Filed 26 *January*, 1861.

State of Louisiana, second dist. court of N. O.

SUCCESSION *of* ELIZABETH CLEW. } No. 15285.

Before me, Octave Morel, deputy clerk of the second district court of New Orleans, personally came and appeared John F. Clew, who solemnly swear that he will and faithfully perform, all and singular, the duties of testamentary executor of the deceased. So help me God.

(Signed) JOHN F. CLEW.

Sworn to and subscribed before me New Orleans this 26th day January, 1861.

(Signed) OCTAVE MOREL, *D'y Clk.*

129 *Letters testamentary.*

The State of Louisiana to all whom these presents shall come, greeting:

Whereas John F. Clew, named and appointed testamentary executor of

the last will and testament of the said late Elizabeth Clew, his deceased wife, has applied to the second district court of New Orleans, by petition, said court to grant letters testamentary thereon:

Now, know ye, that the said John F. Clew is hereby authorized and empowered to collect all the goods and effects which were of said Elizabeth Clew, deceased, and to make a just inventory thereof, and all other lawful acts to do and perform as testamentary executor of the said last will and testament.

Witness our hands and the seal of said court at the city of New Orleans this 26th day of January, in the year of our Lord one thousand eight hundred and sixty-one, and the eighty-fifth of the Independ-
130 ence of the United States.

[SEAL.] (Signed) P. H. MORGAN, *Judge.*
" A. MOREL, *D'y Clk.*

Oath of appraiser.

State of Louisiana, second dist. court of N. O.

SUCCESSION of ELIZABETH CLEW. } No. 15285.

Before me, Gustave Morel, deputy clerk of the second district court of New Orleans, personally came and appeared Alphonse Morel, who solemnly swears that he will and faithfully perform all and singular the duties of appraiser in said succession. So help me God.

(Signed) A. MOREL.

Sworn to and subscribed before me New Orleans, this 28 January, 1861.

(Signed) G. MOREL, *D'y Clk.*

Oath of appraiser.

State of Louisiana, second dist. court of N. O.

SUCCESSION of ELIZABETH CLEW. } No. 15285.

131 Before me, Gustave Morel, deputy clerk of the second district court of New Orleans, personally came and appeared Edmond Wiltz, who solemnly swears that he will well and faithfully perform all and singular the duties of appraiser to value the property to be mentioned in said succession. So help him God.

(Signed) EDMOND WILTZ.

Sworn to and subscribed before me New Orleans, this 26th day of January, 1861.

(Signed) G. MOREL, *D'y Clk.*

Petition transmitting inventory, and for homologation thereof, filed February 1st, 1861.

Second district court of New Orleans.

SUCCESSION of ELIZABETH CLEW. } No. 15285.

This petition of John F. Clew, executor of the last will and testament of Elizabeth Clew, deceased, respectfully represent: That petition-
132 er herewith transmit an inventory of all the property and effects of the succession in the parish of Orleans, taken according to law, by Theodore Gayol, a notary of this parish, in pursuance of the order of this honorable court.

Wherefore petitioner prays that said inventory be homologated, and that letters testamentary be issued to petitioner upon the execution of a bond according to law, and for all general and equitable relief.

(Signed) BENJAMIN & FINNEY,
Att'ys.

Inventory of the property and effects of Elizabeth Clew, deceased, filed February, 1861.

By virtue of and in obed'ence to an order of the honorable the second district court of New Orleans, bearing date the twenty-fifth of the present month, and directing an inventory of the property belonging to the succession of Mrs. Elizabeth Clew, deceased wife of John
133 F. Clew, to be taken by the undersigned notary, which order was rendered on the supplemental petition of the said John F. Clew, in his capacity of testamentary executor and universal legatee of the said deceased wife, as appears by the annexed copy of the said supplemental petition and order of court:

Be it known that, on the twenty-eighth day of the month of January, in the year of our Lord one thousand eight hundred and sixty-one, I, Theodore Guyol, a notary public, duly commissioned and sworn for the parish of Orleans, State of Louisiana, accompanied by the said John F. Clew in his capacity of testamentary executor and universal legatee as aforesaid, by Mr. Edmond Calcur Wiltz and Alphonse Morel, experts, appointed and sworn by said court to appraise the property to be herein inventoried, and by Mess. William G. Latham and Prosper Camus, also of this city, witnesses, of lawful age, prosecuted to take an active, faithful, and correct inventory of all and singular the property
134 belonging to said succession, together with the valuations thereto affixed by the said appraisers, in the manner and form following, to wit:

REAL PROPERTY.

Six lots of ground, with the improvements thereon, situate in the faubourg Luandais, fourth district of this city, in the square No. fifty-five, on the original plan of said faubourg, which is bounded by Magazine, Live-Oak, First, and Philip streets, the said lots designated by Nos. one, two, three, four, five, and six, on a plan by Henry Moelhauson, on the 5th May, 1846, and deposited in the office

of L. R. Kearney, late notary public in the parish of Jefferson, in this State, adjoining each other, and measuring each thirty feet five inches front on Magazine street, by one hundred and thirty feet in depth between parallel lines, valued together at five thousand five hundred dollars $5,500 00

Another lot of ground, with the improvements thereon, situate in the same square adjoining the lots above described, and measuring twenty-seven feet and six inches on First street, between Live-Oak and Magazine streets, by
135 a depth of one hundred and eighty-two feet six inches between parallel lines, valued at seven hundred dollars 700 00

Two lots of ground, with the improvements thereon, situated in the fourth district of this city, and designated by the Nos. three and four of square No. twenty on the original plan of said faubourg, lot No. three, having thirty-seven feet eleven inches front on Magazine street, by one hundred and fifty-eight feet three inches in depth between parallel lines, and lot No. four, measuring thirty-seven feet eleven inches front on Magazine street, by one hundred and fifty-eight feet three inches in depth, on the side adjoining lot No. three; thence on the line dividing it from other property in the rear, forty-nine feet five inches, till it reaches the property of Mrs. Levaredais; thence on the line dividing it from said property one hundred and fifty-eight feet seven inches, till it reaches the front on Magazine street, valued together a five thousand dollars. 5,000 00

Amount b't fo'ward $11,200 00

136 Amount carried forward $11,200 00

Two lots of ground, with the improvements thereon, situate in the fourth district and designated by the Nos. one and two of the square, bounded by Eighth, Levee, and Seventh street and the public road, on a plan drawn by Harrisson, on the 1st May, 1844, and annexed to an act passed before J. B. Marks; lot No. one, measuring twenty-six feet two and half inches front on Levee street, one hundred and twenty-one feet six inches in depth and front on Eighth street, one hundred and twenty-two feet ten inches and four lines in depth on the line dividing it from lot No. two, and twenty-six feet four inches and a half line in width in the rear, and front on the public road; lot No. two, measuring twenty-six feet two and a half lines front on Levee street, one hundred and twenty-two feet ten inches and four lines in depth on the line dividing it from lot No. one, one hundred and twenty-four feet three inches on the opposite side line, and twenty-six feet four inches and—

Amount b't forward $11,200 00

137 Amount carried forward $11,200 00

a half line in width in the rear, and front on the public road; valued together at three thousand five hundred dollars 3,500 00

Four lots of ground, with the improvements thereon, situate in the fourth district, in the square bounded by Seventh, Eighth, and Levee street, and by the public road, and described by the Nos. one, two, three, and four, on a plan drawn by Moelhausen, on the 21st January, 1846, and deposited as plan No. 35 in the office of G. R. Stringer, late notary in this city; lot No. one, having twenty-six feet four inches and one line front on the public landing, by sixty-three feet six inches on the line next to Seventh street, sixty-three feet three inches and one line on the line dividing it from lot No. two, and twenty-six feet two inches and one-half line on the rear line dividing it from lot No. four; valued at eight hundred dollars..... 800 00

Lot No. two, having twenty-six feet four inches and one line on the public landing, by sixty-three—

Amount bro. forward..... $15,500 00

138 Amount carried forward..... $15,500 00

feet three inches and one line in depth on the line dividing it from lot No. one; sixty-three feet one inch and four lines in depth on the line next to Eighth street; and twenty-six feet two inches and one and half line in the rear, on the line dividing it from lot No. three; valued at eight hundred dollars..... 800 00

Lot No. three, having twenty-six feet and two lines front on Levee street, by sixty-three feet one inch and four lines in depth on the line next to Eighth street; sixty-three inches and one line, on the line dividing it from No. four; and twenty-six feet two inches and one and a half lines on the real line dividing it from lot No. two; valued at eight hundred dollars 800 00

And lot No. four, twenty-six feet and two lines front on Levee street, by a depth of sixty-three feet three inches and one line on the line dividing it from lot No. three; sixty-three feet and six lines on the line next to Seventh street, and twenty-six feet two inches and one and a half line—

Amount bro't forward $17,100 00

139 Amount carried forward..... $17,100 00

in the rear, valued at eight hundred dollars..... 800 00

Two lots of ground, with the improvements thereon, situate in the fourth district, and designated by the letters A. R. and A. S., on a plan drawn by Buisson and deposited in the office of G. R. Stringer, late notary; lot A. R. having fifty-one feet one inch front on Levee street, fifty feet front on the Mississippi River, by a depth of two hundred and three feet on one side, and of one hundred and ninety-eight feet six inches on the other side. Valued at fifteen hundred dollars..... 1,500 00

An lot A. S. having fifty-one feet one inch front on Levee street, fifty feet front on the river Mississippi, by a depth of one hundred and ninety-eight feet six inches on one side and of one hundred and ninety-four feet on the other side. Valued at fifteen hundred dollars..... 1,500 00

Two lots of ground situate in the fourth district in square No. sixty, which is bounded by—

Amount bro't forward..... $20,900 00

140 Amount carried forward..... $20,900 00

Live Oak, Magazine, Sixth, and Washington streets. The said lots are designated by the numbers thirty-one and thirty-two; they adjoin each other, and measure each thirty feet front on Levee street, by a depth of one hundred and fifty-eight feet two inches between parallel lines. Valued together at eight hundred dollars..... 800 00

Two lots of ground, with the improvements thereon, situate in the fourth district, in the said square No. sixty, and designated by the No. twenty-nine and thirty, having each thirty feet front on Live Oak street, by one hundred and fifty-eight feet two inches in depth between parallel lines. Valued together at eight hundred dollars..... 800 00

Amounting in all to twenty-two thousand five hundred dollars..... $22,500 00

SLAVES.

A negro woman named Letitia, aged forty-two years, with her son Fred, aged fifteen years. Valued together at one thousand dollars..... $1,000 00

141 CASH.

Here the said testamentary executor and universal legatee declared that there is in the hands of J. P. Benjamin of this city, attorney, the sum of twenty-two hundred and three dollars and fifty-five cents, amount of a certain notes collected by him for account of said deceased, which said sum bears interest from the date it was collected until paid, at eight per cent..... $2,203 55

CLAIM.

A claim against Geo. L. Brown and others of thirteen hundred and eighteen *hundred* dollars and thirty-one cents, for which judgment has been rendered in favor of the said deceased by the second district court of New Orleans..... $1,318 81

And now the said testamentary executor and universal legatee declared that he knew of no other property, rights, credits, or effects in which the said deceased have an interest, and situate within this parish;

whereupon, I, the said notary, proceeded to close the present
142 inventory with the following recapitulations, viz:

RECAPITULATION.

Amount of the appraised value of the landed property hereinabove mentioned, the sum of twenty-two thousand five hundred dollars	$22,500 00
Amount of the appraise' value of slave', the sum of one thousand dollars	1,000 00
Amount of cash in the hands of J. P. Benjamin, exclusive of interest, twenty-two hundred & three dollars and fifty-five cents	2,203 55
Amount of judgment against Geo. L. Brown & others, exclusive of interest, thirteen hundred and eighteen dollars and thirty-one cents	1,318 31
Total amount of this inventory, twenty-seven thousand and twenty-one dollars and eighty-six cents	$27,021 86

In testimony whereof I have hereunto signed my name, together with the said testamentary executor and universal legatee and witnesses, on the twenty-eighth day of January, eighteen hundred and sixty-one.

(Signed) JOHN F. CLEW.
EDMOND V. WILTZ.
W. G. LATHAM.
A. MOREL.
P. CAMUS.
THEO. GUYOL,
Not. Pub.

143 A true copy.
(Signed.) THE. GUYOL,
[s. s.] *Not. Pub.*

Order of court, homologating foregoing inventory, &c.

Let the accomp'ying inventory be filed, approved, and homologated, and let letters testamentary executorship be delivered to the petitioner on his giving bond and security in the sum of thirty-four thousand dollars, said bond conditioned as the law directs.

New Orleans, February 1st, 1861.

(Signed) P. H. MORGAN, *Judge.*

Bond of testamentary executor.—Filed February 5th, 1861.

THE STATE OF LOUISIANA,
Second District Court of New Orleans:

Know all men by these presents, that we, John F. Clew, as principal, Albin Rochereau, as security, of the State of Louisiana, are held and firmly bound unto P. H. Morgan, judge, of the second district
144 court of New Orleans, or to his successors in office, in the sum of thirty-four thousand dollars current money of the United States of America, which we promise to pay to him or his successors in office; for the faithful performance of which we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, renouncing all benefit of division or

discussion whatsoever. Sealed with our seals this 5th day of February, in the year of our Lord one thousand eight hundred and sixty-one, and the eighty-fifth of the Independence of the United States of America.

The condition of the above obligation is such, that if the above bounden John F. Clew, testamentary executor of the estate of the late Elizabeth Clew, deceased, does well and truly, according to law, administer the same, and further does make, render a true, just, and perfect account of his actions and doings when thereto lawfully required,
145 either by the aforesaid judge or his successors in office, agreeably to law, or by the heirs of said deceased or their lawful attorney or attorneys, then this obligation to be void, or else to remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals this day and year first above written, in presence of—

(Signed) JOHN F. CLEW,
ALBIN ROCHEREAU.

(Signed) ODEM MOREL,
D'y Clk.

Rule of J. M. Demarest, Dat. Test. Ex. of S'l Brown, on John F. Clew, Test. Ex. of Mrs. E. Clew.

STATE OF LOUISIANA, *Second District Court of New Orleans:*

FRIDAY, *12th day of February*, 1864.

Present, the Honorable J. S. Whitaker, judge.

No. 15285.—Succession of Elizabeth Clew.

146 On motion of J. M. Demarest, dative testamentary executor of the estate of Samuel Brown and a creditor of this succession in seven thousand dollars and upwards, it is now ordered by the court that J. F. Clew, testamentary executor of this succession, do show cause on Wednesday, 24th February, 1864, why he should not file an account of his administration; why he should not pay mover's claim; why he should not sell the property of the succession and pay the debts; why he should not give new and additional security, and why he should not produce his bank-book; and, in default, why he should not be destituted of his office and subjected to the penalties of the law; and that this rule be served upon Eugene Rochereau, esq., agent and attorney in fact of the said testamentary executor, who is absent from this State, to wit: J. F. Clew. (Extract from the minutes.)

(Signed) M. H. FLANAGAN, *D'y Clk.*

Sheriff's return endorsed on copy of above rule.

147 Received February 13th, 1864, and on the same day served a copy of this rule on Albin Rochereau, agent of defendant herein, personally. Returned same day.

(Signed) ROBERT SWAIN, *D'y Sh'ff.*

Agreement of counsel.—Filed February 24th, 1864.

No. 15285.—Succession of Elizabeth Clew.—Second district court of New Orleans.

By agreement between the respective counsel, the rule herein taken and returnable this day is fixed for trial on the 24th March, 1864, Thursday.

(Signed) J. MAGNE, *for Defendant.*
" DURANT & HORNOR, *for Plaintiff in Rule.*

Order rule continued as entered on the minutes February 24th, 1864.

148 No. 15285.—Succession of Elizabeth Clew.—Second district court of New Orleans.

By written consent of counsel on file, it is ordered by the court that the rule taken herein on the 12th instant by John M. Demarest, a creditor of said succession, upon J. F. Clew, testamentary executor, to file an account, &c., and proceed to a sale, be continued till Thursday, the 24th March, 1864.

Order rule continued as entered on the minutes 24th March, 1864.

No. 15285.—Succession of Elizabeth Clew.—Second district court of New Orleans.

On motion of J. Magne, esq., of counsel, it is ordered by the court that the rule taken herein on the 12th of February by J. M. Demarest, upon J. F. Clew, test. ex'r, to file an account, be continued indefinitely.

149 *Order rule renewed as entered on the minutes May 17th, 1864.*

No. 15285.—Succession of Elizabeth Clew.—Second district court of New Orleans.

On motion of Durant & Hornor, esq., att'ys for John M. Demarest, dative testamentary executor of the succession of Samuel Brown, it is ordered by the court that the rule hereinbefore taken on John F. Clew, executor of this succession, on the 12th of February last, be fixed for trial on Monday next, the 23d day of May, 1864, at 10 o'clock a. m., and that A. Rochereau, esq., attorney in fact of said Clew, executor, be notified thereof.

Notice of trial to A. Rochereau, att'y in fact of J. F. Clew.

No. 15285.—Succession of Elizabeth Clew.—State of Louisiana, second district court of New Orleans.

150 To. A. Rochereau, esq., att'y in fact of J. F. Clew, executor:

SIR: Please to take notice that the rule taken on the 12th day of February last in the above-entitled case is fixed for trial on the 23d day of May, 1864.

(Signed) A. MOREL, *D'y Cl'k.*

Sheriff's return endorsed on foregoing notice.

Received May 18th, 1864, and, on the 19th of same month and year, served a copy of this notice on A. Rochereau, att'y in fact of J. F. Clew, executor, personally. Returned same day.

(Signed) ROB'T SWAIN, *D'y Sh'ff.*

Order rule continued as entered on the minutes May 23d, 1864.

No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

On motion of Durant & Hornor, esq's, of counsel for J. M.
151 Demarest, dative testamentary executor of Samuel Brown, it is

ordered by the court that the rule heretofore taken on J. F. Clew, executor of this succession, on the 12th February last, and fixed for trial to-day, be continued until Tuesday, the 31st of May, 1864, at 10 o'clock a. m., and that A. Rochereau, esq., att'y in fact of said Clew, be notified thereof.

Notice of trial to A. Rochereau, att'y in fact of J. F. Clew.

No. 15285.—Succession of Elizabeth Clew.—State of Louisiana, second district court of New Orleans.

To A. Rochereau, esq., att'y in fact of J. F. Clew, executor.

SIR: Please take notice that the rule taken herein on the 12th of February last, and fixed for the 23d May, 1864, in the above-entitled case, is fixed for trial on the 31st day of May, 1864, at 10 o'clock a. m.

(Signed) A. MOREL,
D'y Clk.

152 *Sheriff's return endorsed on foregoing notice of trial.*

Received May 24, 1864, and on the same day of the same month and year, I served a copy of the within notice on E. Rochereau in person. Returned same day.

(Signed) B. ALBERT, *D'y Sh'ff.*

Exception and answer to rule.—Filed May 31st, 1864.

No. 15285.—Second district court of New Orleans.

Now appears by counsel the defendant in rule, J. F. Clew, who, for exception and answer, says:

1st. That said plaintiff in rule cannot legally represent the succession of Samuel Brown, when, as was done in that case, the heirs of that succession were duly put in possession in April, 1850.

2d. That, should the foregoing exception be overruled, then he
153 says that the deceased, Elizabeth Clew, has obtained, in 1853, a judgment for $1,318 31 against all the heirs of the late Samuel Brown, to wit: Geo. L. Brown, Christopher Brown, Rebecca Brown, Mary Rex, late Mary Coe, William Brown, Charles Gerkes, guardian of Samuel B. Gerks and Charles G. Gerks, jr., which judgment is to be deducted, with interest and costs, from the claim of the same parties against said deceased.

3d. That he is warned by D. N. Hennen, the representative of all the heirs, except the minors Gerkes, of Samuel Brown, not to pay plaintiff in rule more than one-sixth, the other five sixths accruing to the said heirs represented by him.

Wherefore he prays that the rule herein taken be discharged on the exception, and if not discharged he prays that he be dispensed to pay to plaintiff the five-sixths accruing to the heirs of Samuel Brown, aforenamed, and he further prays to be authorized to compensate the
154 judgment obtained by the deceased against all and every one of said heirs of Samuel Brown, and for general relief.

(Signed) J. MAGNE, *of Counsel.*

Note of evidence.—Filed 31st May, 1864.

No. 15285.—Succession of Elizabeth Clew.—Second district court of New Orleans.

Plaintiff in rule offers in evidence the record of the suit of Brown, Ex'r, vs. Clew and husband, No. 6369, of the docket of this court.

Defendant offers in evidence the suit No. 5931, of the docket of this court, Mrs. Clew vs. The heirs of Brown; also, the record of the succession of Samuel Brown in the sixth district court, to show the putting in possession of the heirs of Brown. Also, two letters from Mr. Hennen to Clew, to prove rem ip sam, now filed.

Two letters of D. N. Hennen to John F. Clew.—Filed May 31st, 1864.

155 NEW ORLEANS, *January 28th*, 1861.

J. F. CLEW, Esq.:

SIR: I beg leave to notify you, in behalf of all the heirs of the late Samuel Brown, (with the exception of the minors, Gerkes,) that said heirs are entitled to five-sixths of a judgment obtained against you and the late Mrs. Clew, No. 6369, second district court, for the sum of $4,403 55, interest at 6% from—

	4,403 55
Jan. 1, '50, 11 years & 26 days	2,925 41
Cost of supreme court	22 80
Clerk 2d dist. court	75 75
Sheriff's fees	81 65
	$7,459 16

which judgment is entitled to an offset of judgment obtained by you in said court No. , of about $1,300.

I therefore notify you not to pay the $\frac{5}{6}$ of the above to any person except said heirs or their lawful attorney.

Very respectfully, your ob't serv't,

(Signed) DUNCAN N. HENNEN.

Rule absolute, as entered on the minutes, May 31st, 1864.

156 No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

The rule taken herein on the 12th of February last by J. M. Demarest, dative test'y ex'or of the succession of Samuel Brown, upon J. F. Clew, ex'r of this succession, to show cause why he should not file an account, sell property of the succession, and produce his bank-book, &c., came on this day. Durant & Horner, esq's, for plaintiff in rule. J. Magne, esq., for defendant in rule.

When, after hearing pleadings, documentary evidence, and counsel, it is ordered that the rule be made absolute, so far as to require the executor of Mrs. Clew to file his account herein, and pay the judgment due the plaintiff in rule, leaving open the question of compensation and sett-off.

Petition submitting account.—Filed August 19th, 1864.

No. 15285.—Second district court of New Orleans.—Succession of Mrs. Elizabeth Clew.

157 The petition of John F. Clew, testamentary executor of his late

deceased wife, Mrs. Elizabeth Clew, respectfully represents: That, in order to liquidate completely the above-entitled succession, he now files herewith a final account of his administration, for the purpose of obtaining his discharge as testamentary executor and of being put in possession as universal legatee.

Wherefore he prays that the within account be duly published and advertised, and that after due proceedings had it be approved and homologated. He further prays, after due process of law, he be discharged from any further responsibility in the premises, and for general relief.

(Signed) J. MAGNE,
Of Counsel.

Final account.—Filed August 19th, 1864.

Final account of the succession of Mrs. Elizabeth Clew, rendered by the testamentary executor.

ASSETS.

158	Real estate fully described in the inventory on file, and appraised therein at twenty thousand five hundred dollars		22,500 00
	A slave, appraised one thousand dollars, and now of no value.		
	Amount of cash stated in said inventory to be in the hands of J. P. Benjamin, esq., twenty-two hundred and three $\frac{53}{100}$ dollars, but which were never received by the executor.		
	Amount of the judgment in favor of the deceased and against G. L. Brown, et al's, exclusive of interest, thirteen hundred and eighteen $\frac{31}{100}$ dollars, also included in said inventory and not recorded		1,318 31
	Total of assets		23,818 31

LIABILITIES

	Succession of the late Samuel Brown, by judgment of the 2d dist. court, No. 6369, rendered 21 June, 1853, against deceased, and affirmed by the supreme court on the 13th June, 1855, $4,403 55, less the amount of a judgment rendered by the same court, No. 5931, on the 28th June,		
159	1853, in favor of deceased and against the heirs of the said Samuel Brown, for the sum of $1,318 31, but reduced by the supreme court on the 13th June, 1855, to $12 58		3,145 55
	Interest thereon, at 6 per cent. per annum, from 1st January, 1850, until paid, say up to 30th September, 1864, 14 years $\frac{3}{4}$		2,783 78
	Cost of No. 6369: clerk, $75 75; sheriff, $31 65; supreme court, $22 80; together	$130 20	
	Less costs No. 5931, clerk $45 43 Sheriff 14 20	59 63	
			70 57
	Total amount due to the succession of Samuel Brown		5,999 90

N. B.—There are no debts due by this succession except the one above stated as a liability for fifty-nine hundred and ninety-nine dollars and ninety cents.

New Orleans, August 19th, 1864.

(Signed) W. T. HEPP, *Agent.*

Order of court for publication of foregoing account, and endorsed on foregoing petition.

160 Let public notice be given to the creditors of this estate, and to all persons therein interested, to show cause within ten days from first publication, why this account should not be approved and homologated, and the funds distributed accordingly.

New Orleans, August 19th, 1864.

(Signed) JOHN W. THOMAS, *Judge.*

Opposition of executor of S. Brown.—Filed August 30th, 1864.

No. 15285.—Second district court of New Orleans.

The opposition of John M. Demarest, dative testamentary executor of Samuel Brown, respectfully shows: That, by virtue of a judgment of the supreme court of this State, he is entitled in law to the sum of forty-four hundred and three $\frac{53}{100}$ dollars, with 6 % interest per annum from 1st January, 1850, and costs, without any offset whatever. That the executor of this succession knowingly and wilfully filed an offset in his tableau which has no business there, and is no judgment or even
161 claim against the succession of Samuel Brown. Wherefore this opponent prays that the tableau be amended by placing this account thereon for the full amount of his judgment, interest, and costs, with all general and equitable relief.

(Signed) DURANT & HORNOR,
Attorneys for Executor.

Proof of publication.—Filed August 31st, 1864.

Second district court of New Orleans.—No. 15285.—Succession of Elizabeth Clew.

A. Merling, being duly sworn, says: That the advertisements for the homologation of the account presented by the testamentary executor have been published in the N. O. Bee, on the 20th, 24th, and 24th August, 1864, in the French and English languages. One opposition.

(Signed) A. MERLIN.

Sworn to and subscribed before me this 31st day of August, 1864.

(Signed) A. MOREL, *D'y Clk.*

Judgment homologating account.

162 On motion of J. Magne, of counsel for the testamentary executor, and upon producing to the court due proof of the publications required by law of the filing of the account therein on the 19th instant, and that but one opposition has been filed thereto, it is ordered and adjudged that said account be approved and homologated so far as not opposed.

Judgment rendered August 31st, 1864; judgment signed September 7th, 1864.

(Signed) JOHN W. THOMAS, *Judge.*

Order oppositions continued as entered on the minutes September 19th, 1864.

No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

The opposition in these cases fixed for to-day were ordered to be continued with preference.

Testimony.—Filed October 22, 1864.

163 No. 15,285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

Counsel for opponent introduces in evidence the proceedings in the case of Samuel Brown, sixth district court, No. 1429 of the docket of said court and formerly in the 3d judicial district of the parish of Jefferson. Also, record No. 5931 of this court entitled Mrs. Clew vs. Geo. L. Brown, agent. Also, No. 6369 of the docket of this court, entitled Brown, executor, vs. Mrs. Clew.

Opposition submitted as entered on the minutes Oct'r 22d, 1864.

No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

The opposition herein came on to-day for trial. Durant & Hornor for opponent. J. Magne for the test'y executor. And after hearing
164 proceedings, evidence, and arguments of counsel the court took the same under consideration.

Reasons for judgment.—Filed November 9, 1864.

No. 15285.—Second district court of New Orleans.—Succession of Mrs. Elizabeth Clew.

George L. Brown, as executor of Samuel Brown, recovered judgment for the sum of $\$4{,}403\frac{50}{100}$ and costs against the deceased. The deceased recovered judgment against Geo. L. Brown and all the heirs and legatees of Samuel Brown, in the sum of $\$1{,}318\frac{31}{100}$, reduced to $1,258; one suit is styled "Geo. L. Brown, ex'r, vs. Elizabeth Clew & husband," the other, "Elizabeth Day, wife of Clew, vs. Geo. L. Brown, agent." I am unable to perceive any material difference between any executor acting in such capacity, or in the capacity of agent of all the heirs and legatees. I think they were properly placed on the tableau. Let the opposition, therefore, of J. M. Demarest, dative testamentary
165 executor, be dismissed, with costs; and the tableau as thus amended is approved and homologated.

Judgment on opposition.

For the reasons assigned in the written opinion of the court, this day delivered and on file; it is therefore ordered, that the opposition of John M. Demarest, dative testamentary executor to the tableau filed herein on the 19th August last, be dismissed with costs; and the tableau as thus amended is approved and homologated.

Judgment rendered November 9th, 1864. Judgment signed November 28th, 1864.

(Signed) JOHN W. THOMAS, *Judge.*

Rule for new trial.—Filed November 11th, 1864.

No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

On motion of Durant & Hornor, attorney for J. M. Demarest, administrator of the succession of Samuel Brown, it is ordered by the
166 court that J. F. Clew, administrator of this succession, do show cause on Wednesday the 16th day of November, 1864, at 10 o'clock a. m., why a new trial should not be had in this case, on the grounds following:

First. Because the judgment herein rendered is clearly contrary to the law and evidence.

Second. Because the court erred in sustaining the plea of compensation on the grounds following:

a. Because the court have uniformly refused to permit the heirs of Brown to share in the judgment in favor of Brown, administrator.

b. Because this court is without jurisdiction to make a compensation. The court that appointed Demarest administrator has alone jurisdiction.

c. Because the court has entirely overlooked the difference between a judgment against a succession and a judgment against the heirs, accepting with benefit of inventory.

Order rule submitted as entered on the minutes Nov'b'r 15th, 1864.

167 No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

The rule herein taken by John M. Demarest on the 11th instant for a new trial, came on to-day for hearing. Durant & Hornor for plaintiff in rule, J. Magne for defendant herein. After hearing pleadings and arguments of counsel, it is ordered the same be submitted to the court for adjudication.

Order rule dismissed as entered on the minutes November 26th, 1864.

No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

For the reasons already delivered in open court, it is ordered that the rule taken herein by J. M. Demarest on the 11th instant for a new trial, be dismissed with costs.

Order of appeal as entered on the minutes November 30th, 1864.

168 No. 15285.—Second district court.—Succession of Elizabeth Clew.

On motion of Durant & Hornor, attorneys for John M. Demarest, dative testamentary executor of Samuel Brown, it is ordered that a suspensive appeal be granted to mover herein from the judgment herein sustaining the plea of compensation made by the executor of the succession of Elizabeth Clew, upon his giving bond and security in the sum of two hundred dollars, conditioned as the law directs, and that this appeal be made returnable in the supreme court of the State on the last Monday in December next, and without prejudice to the right of mover to be paid the amount acknowledged to be due by the said executor of Clew to the succession of Samuel Brown.

Bond of appeal.—Filed November 30th, 1864.

Know all men by these presents that we, John M. Demarest, dative testamentary executor of S. Brown and Charles W. Hornor, are
169 held and firmly bound unto John F. Clew, his executors, administrators, and assigns, in the sum of two hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated in the city of New Orleans on this 30th day of November, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-bounden John M. Demarest, dative testamentary executor, this day filed a petition of appeal from a final judgment rendered against him in the suit of the succession of Elizabeth Clew in the second district court of New Orleans on the 9th of November, 1864:

Now, the condition of the above obligation is such, that the above-bound John M. Demarest, executor, shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal or otherwise, that the said C.
170 W. Hornor, surety, shall be liable in his place.

(Signed) JOHN M. DEMAREST, [L. S.]
Dat. Test'y Ex'r of Sam'l Brown.
By DURANT & HORNOR, *Att'ys.*
(Signed) CHA'S W. HORNOR. [L. S.]

Rule of J. M. Demarest, ex'r, on J. F. Clew, ex'r.

State of Louisiana, second district court of New Orleans.—No. 15285.—Succession of Elizabeth Clew.

On motion of Durant & Hornor, attorneys for J. M. Demarest, executor of Brown, and on showing to the court that by the tableau filed herein by the executor of Mrs. E. Clew, there is an amount acknowledged to be due to the mover, of $5,999 90. It is now ordered by the court that J. F. Clew, testamentary executor of this succession, do show cause on Thursday, the 8th day of December, 1864, at 10 o'clock a. m., why said sum, admitted to be due, should not be paid over to mover in this rule. (Extract from the minutes.)

[SEAL.] (Signed) A. MOREL, *D'y Clk.*

171 *Sheriff's return endorsed on copy of foregoing rule.*

Received December 2, 1864. On the same day I served a copy of the within rule on J. F. Clew, defendant herein, through Rochereau & Co., his lawful agents, whom I knew to be such by interrogatories, by leaving the same in the hands of Charles F. Dugazon, one of this firm, in person; the said J. F. Clew being absent from the city at the time of said service. Returned same day.

(Signed) B. ALBERT, *D'y Sh'ff.*

Rule absolute as entered on the minutes Nov'b'r 8th, 1864.

No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

The rule herein taken by John M. Demarest, on the second instant, came on to-day for trial. Durant & Hornor for plaintiff in rule. J.

Mayne for defendant therein. And after hearing pleadings and counsel, it is ordered that the said rule be made absolute, and that the
172 defendant in rule be allowed thirty days to pay said sum of $5,999 90 *dollars.*

Order to enter decree of supreme court as entered on the minutes of March 28th, 1866.

No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

An appeal having been taken in this case in the supreme court of the State, it is ordered that the decree of said court be now filed and entered of record in this court, and said decree is in the words and figures following, viz: It is therefore ordered that the appeal be dismissed, at the costs of the appellant.

Decree of supreme court.—Filed March 20th, 1866.

Monday, March 5th, 1866.—Succession of Elizabeth Clew.—An appeal from the second district court of New Orleans.

Mr. Justice ILSLEY.—In the final account of administration
173 rendered by the testamentary executor on the 19th August, 1864, the claim of the succession of the late Samuel Brown is thus inscribed:

Succession of the late Samuel Brown, by judgment of the second district court, No. 6369, rendered 21st June, 1853, against the deceased, and affirmed by the supreme court on the 13th June, 1855	4,403 55
Less the amount of a judgment rendered by the same court, No. 5931, on the 28th June, 1853, in favor of deceased, and against the heirs of the said Samuel Brown, for the sum of $1,318 30, but reduced by the supreme court on the 13th June, 1855, to $1,258	1,258 00
	3,145 55
Interest thereon, at six per cent. per annum, from 1st January, 1850, until paid, say up to 30th September, 1864, 14 years	2,783 78
Costs of No. 6396: clerk, $75 75; sheriff, $31 65; supreme court, $22 80; together, $130 20.	
Deft's writs No. 5931: clerk, $45 45; sheriff, $14 20; together, $59 60	70 57
	$5,999 90

Opposition to the compensation claimed against the judgment
174 in favor of the succession of Samuel Brown was made by the testamentary executor of his last will, who claims the whole amount of the judgment in the suit, No. 6369, in favor of his predecessor, G. L. Brown. The opposition was dismissed in the court below, and the reasons assigned for the dismissal are thus stated by it: George L. Brown, as executor of Samuel Brown, recovered judgment for the sum of $4,403 50, and costs against the deceased. The deceased, Mrs. Elizabeth Clew, received judgment against Geo. L. Brown and all the heirs and legatees of Samuel Brown, in the sum of $1,318 31, reduced to

$1,258. One suit is styled, "George Brown, executor, vs. Elizabeth Clew & husband;" the other, "Elizabeth Brown, wife of Clew, vs. G. L. Brown, agent." I am unable to perceive any material difference between any executor acting in such capacity or in the capacity of agent of all the heirs and legatees.

On the trial of the opposition (page 47, Record) certain evidence
175 was adduced, to wit: The record in the suit No. 6396, Brown, ex'tor, vs. Clew & husband; and also the record of the suit No. 593', Mrs. Clew vs. The heirs of Brown; also the record in the succession of Samuel Brown; and none of this testimony is extant upon the record of this suit, although the clerk of the court below certified it to be complete.

In the case of Harris vs. Hays, 8 A, 433, the court observed: "The appellant, whose duty it was to bring up all the evidence, cannot profit by his own wrong to have the judgment reversed to the prejudice of the other party. Nul prendra avantage de son tort des meme." It was the duty of the appellant to suggest at the proper time a diminution of the record in the defective transcript. Gillenlet vs. Marcellin, 7 A, 442; Levy vs. Weber, 8 A, 439.

It is, therefore, ordered that the appeal be dismissed at the costs of the appellant.

Rule.—Filed March 27th, 1866.

No. 15285.—Second district court of New Orleans.—Succession
176 of Mrs. Elizabeth Clew.

On motion of Durant & Hornor, att'ys for J. M. Demarest, dat. test'y ex'r of Samuel Brown, and on showing to the court that by the tableau filed by the executor of Clew in this case and in this court there is an amount of $5,999 90 put down as due to mover herein on the 30th day of September, 1864, when the said account was filed, which is a judicial admission of the amount due on that date, and on further showing that a rule was taken by mover herein on the said executor Clew to pay over said amount acknowledged to be due mover, which was made absolute, and the said amount still remains due and unpaid, and on further showing that all debts bear interest from the date they fall due.

It is, therefore, now ordered by the court that John F. Clew, test'y executor of this succession, do show cause on Tuesday, the 27th day of March, 1866, at 11 o'clock a. m., why he should not pay interest on the amount of $3,145 from 30th September, 1864, till final payment, at 6 per cent. interest per annum.

177 Service accepted.
(Signed)

J. MAYNE,
For Def't in Rule.

Order rule absolute endorsed on foregoing rule.

No. 15285.—Second district court of New Orleans.—Succession of Mrs. Elizabeth Clew.

The rule herein filed this day by J. M. Demarest, dative test'y executor of Samuel Brown, deceased, on John F. Clew, test'y ex'tor of deceased, returnable, by consent, this day was taken up. Durant & Hornor, for plaintiff in rule; J. Mayne, for defendant in same.

When after pleadings and evidence and argument of counsel heard and the law considered, it is ordered that the same be made absolute.

Judgment rendered March 27th, 1866; judgment signed April 5th, 1866.

(Signed) J. W. THOMAS,
Judge.

Petition to be discharged and to be put in possession.—Filed March 29th, 1866.

178 No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

To the honorable the judge of the second district court of New Orleans:

The petition of John Ferdinand Clew, the dative testamentary executor of his deceased wife, Elizabeth Clew, and her universal legatee, respectfully represents: That, on the nineteenth day of the month of August, 1864, he filed in this honorable court a final account of his administration, which was duly published and advertised; that an opposition thereto was made by the dative executor of the succession of Samuel Brown; that by judgment of this honorable court, rendered on the 9th of November, 1864, the opposition was dismissed, and the final account homologated, and that the appeal taken from that judgment by said executor of Samuel Brown was dismissed by a decree of the supreme court rendered on the 5th of March, 1866, a duly certified
179 copy of which is on file; that your petitioner has paid the only debt due by the succession of said Elizabeth Clew, as shown by said account, and by the receipt of the attorneys of said executor of Sam'l Brown, hereto annexed as a voucher; that, as shown by the last will and testament of said, the late Elizabeth Clew, duly recorded in and ordered to be executed by this hon. court, and on file, your petitioner is the universal legatee of said Elizabeth Clew, and as such is entitled to be put in possession of the whole estate as described on the inventory on file.

Wherefore, petitioner prays to be discharged from any further trust and liability in the premises, and that his official bond, given by him as testamentary executor, be cancelled and annulled. He further prays to be recognized as the universal legatee of the late Elizabeth Clew, and as such put in possession of the whole property of the succession as described in the inventory on file; and he further prays for
180 general and equitable relief.

(Signed) J. MAYNE,
Of Counsel.

Judgment discharging John F. Clew as testamentary executor, and putting him in possession as the universal legatee.

No. 15285.—Second district court of New Orleans.—Succession of Elizabeth Clew.

The court, considering the petition filed herein by John Ferdinand Clew, praying to be discharged as testamentary executor of the deceased and to be put in possession as universal legatee; and considering, further, the last will and testament of the deceased, as well as the proceedings had in said succession, it is ordered, adjudged, and decreed that John Ferdinand Clew be discharged of all further trust and liabil-

ities as dative testamentary executor of his said deceased wife, Elizabeth Clew, and that he be recognized as universal legatee of his said deceased wife, and as such he be put in possession of all the
181 property left by said deceased, and specially of the property described in the inventory, as follows:

REAL ESTATE.

Six lots of ground, with the improvements thereon, situate in the faubourg Livandais, fourth district of this city, in the square No. fifty-five, on the original plan of said faubourg, which is bounded by Magazine, Live Oak, First, and Philip streets, the said lot being designated by the Nos. one, two, three, four, five, and six, on a plan drawn by Henry Moelhausen, on the 5th May, 1846, and deposited in the office of L. R. Kerney, late notary public in the parish of Jefferson, in this State, adjoining each other, and measuring each thirty feet five inches front on Magazine street, by one hundred and thirty feet in depth between parallel lines, valued together at five thousand five hundred dollars. 5,500 00

Another lot of ground with the improvements thereon, situate in the same square, adjoining the lots above mentioned and described, measuring thirty-seven feet six inches front on First street, between Live Oak and Magazine
182 streets, by a depth of one hundred and eighty-two feet six inches, between parallel lines, valued at seven hundred dollars..... 700 00

Two lots of ground, with the improvements thereon, situated in the Fourth district of this city, and designated by the Nos. three and four, of square No. twenty on the original plan of said faubourg, lot No. three having thirty-seven feet eleven inches front on Magazine street, by one hundred and fifty-eight feet three inches in depth between parallel lines, and lot No. four, measuring thirty-seven feet eleven inches front on Magazine street, by one hundred and fifty-eight feet three inches in depth on the side adjoining lot No. three—

Carried over..... 6,200 00

thence on the line dividing it from other property in the rear, forty-nine feet five inches till it reaches the property of Mrs. Livandais, thence on the line dividing it of said property of one hundred and fifty-eight feet seven
183 inches, till it reaches the front on Magazine street, valued together at five thousand dollars..... 5,000 00

Two lots of ground, with the improvements thereon, situate in the fourth district of this city and designated by the Nos. one and two of the square bounded by Eighth, Levee, & Seventh streets and the public road, on a plan drawn by Harrison on the 1st May, 1844, an' annexed to an act passed before J. B. Marks, notary; lot No. one measuring twenty-six feet two and a half lines front on Levee street, one hundred and twenty-one feet six inches in depth and front on Eighth street, one hundred and twenty-two feet ten inches and four lines in depth on the line dividing it from lot No. two, and twenty-six feet four inches and a half line in width

in the rear and front on the public road; lot No. two measuring twenty six feet and a half line front on Levee street, one hundred and twenty-two feet ten inches and
184 four lines in depth on the line dividing it from lot No. one, one hundred and twenty-four feet three inches on the opposite side line, and twenty-six feet four inches and a half line in width in the rear and front on the public road, valued together at three thousand five hundred dollars... 3,500 00

Four lots of ground, with the improvements thereon, situate in the fourth district of this city, in the square bounded by Seventh, Eighth, and Levee street, and the public landing, and designated by the Nos. one, two, three and four on a plan drawn by Moelhausen on the 21st January, 1846, and deposited as plan No. 35 in the office of G. R. Stringer, late notary in this city; lot No. one having twenty-six feet four inches and one line front on the public landing, by sixty-three feet six inches on the line next to Seventh street, sixty-three feet three inches and one line on the line dividing it from lot No. two, and twenty-six feet two inches
185 and one and a half line on the rear line dividing it from lot No. four, valued at eight hundred dollars.. 800 00

Lot No. two, having twenty-six feet four inches and one line on the public landing, by sixty-three feet three inches and one line in depth on the line dividing it from lot No. one, sixty-three feet one inch and four lines in depth on the line next to Eighth street, and twenty-six feet ten inches and one and a half line in the rear on the line dividing it from lot No. three, valued at eight hundred dollars 800 00

Lot No. three, having twenty-six feet and two lines front on Levee street, by sixty-three feet one inch and four lines in depth on the line next to Eighth street, sixty-three feet three inches and one line on the line dividing it from lot No. four, and twenty-six feet two inches and one and a half line on the rear line dividing it from lot No. two, valued at eight hundred dollars..... 800 00

186 And lot No. four, having twenty-six feet and two lines front on Levee street, by a depth of sixty-three feet three inches and one line on the line dividing it from lot No. three, sixty-three feet and six lines on the line next to Seventh street, and twenty-six feet two inches and one and a half line in the rear, valued at eight hundred dollars ... 800 00

Two lots of ground, with the improvements thereon, situate in the fourth district and designated by the letters A R and A S on a plan drawn by Buisson and deposited in the office of G. R. Stringer, late notary; lot A R having fifty-one feet one inch front on Levee street and fifty feet front on the Mississippi River, by a depth of two hundred and three feet on one side and of one hundred and ninety-eight feet six inches on the other side, valued at fifteen hundred dollars 1,500 00

And lot A S, having fifty-one feet one inch on Levee
187 street, fifty feet front on the river Mississippi, by a depth of one hundred and ninety-eight feet six inches on one side and of one hundred and ninety-four feet on the other side, valued at fifteen hundred dollars..... 1,500 00

Two lots of ground situate in the fourth district of this city in square No. sixty, which is bounded by Live Oak, Maga-

zine, Sixth, Washington streets; the said lots are designated by the No. thirty-one and thirty-two, and measure each thirty feet front on Live Oak street, by a depth of one hundred and fifty-eight feet two inches between parallel lines, valued together at eight hundred dollars 800 00

Two lots of ground, with the improvements thereon, situate in the fourth district of this city, in the said square No. sixty, and designated by the number twenty-nine and thirty, having each thirty feet front on Live Oak street, by one hundred and fifty-eight feet two inches in depth between parallel lines, valued together at eight hundred dol-

188 lars 8,000 00

Amounting in all to twenty-two thousand five hundred dollars. 22,500 00

CASH.

In the hands of J. P. Benjamin, of this city, attorney-at-law, the sum of twenty-two hundred and three dollars and fifty-five cents, amount of certain notes collected by him for account of said deceased, which said sum bears interest from the day it was collected until paid, at eight per cent..... 2,203 55

Total amount 24,703 55

New Orleans, March 29, 1866.

(Signed) J. W THOMAS, *Judge.*

Document "K," referred to in the foregoing statement of facts and made part thereof.

Sale of property—John F. Clew to Harlow J. Phelps.

STATE OF LOUISIANA,

City of New Orleans:

189 Be it known that, on this sixth day of April, eighteen hundred and sixty-six, before me, Selim Magner, a notary public, duly commissioned and sworn, in and for the parish of Orleans, personally came and appeared John Ferdinand Clew, of this city, who declared that for, and in consideration of, the price and sum of fifteen thousand three hundred dollars, the receipt whereof he hereby acknowledges, and in pursuance of the public adjudication made by N. J. Hoey, an auctioneer in this city, on the thirty-first of March, 1866, as the same will fully appear by reference to the process verbal of said auctioneer, annexed to an act of sale from said Clew to P. C. Mandal, passed before me, notary, on the date hereof, he does, by these presents, grant, bargain, and sell, with all legal warranties, and with subrogation to all his rights and actions in warranty against all preceeding vendors or possessors, unto Mr. Harlow J. Phelps, of this city, here present acknowledging possession, and accepting for himself, his heirs, and assigns, eight certain lots of

190 ground, together with all the improvements thereon, and appurtenances thereof, and all the rights, ways, and servitudes thereto belonging, situate in the fourth district of this city, in the square bounded by Magazine, Constance, Phillip, and First streets, designated as lots Nos. one to eight, inclusive, on a plan deposited in my office as plan No. 109, according to which plan said lots measure as follows, to

wit: Lots one to six, inclusive, have each thirty feet five inches front on Magazine street, the same in width in the rear, and one hundred and thirty feet in depth between parallel lines; lot No. one, forming the corner of First and Magazine streets; lots seven and eight, forming one lot on said plan, measure together twenty-seven feet six inches front on First street, by one hundred and eighty-two feet six inches in depth between parallel lines.

Said property belongs to said vendor as the universal legatee of his late wife, Elizabeth Day, widow, by first marriage, of Samuel Broom, recognised as such, and put in possession of her property by a decree of the second district court of New Orleans, dated 29th March,
191 1866, No. 15285 of the docket of said court, registered in conveyance office in this city, in book 91, folio 150. Said late Mrs. Clew acquired said property as Widow Broom, in and by an act of quitclaim, executed before S. H. Lewis, late notary, in this city, on the 30th April, 1850, from the heirs and legatees of the late Samuel Brown. And the latter acquired said property in manner following, to wit: Lots one to six, inclusive, and said lots seven and eight, (as one lot,) by purchase from Thomas B. Winston, by act passed before the late L. R. Kenny, a notary public, in the parish of Jefferson, in this State, on the second of February, 1847.

Said Clew declared that he is neither tutor nor curator of any minors, interdicted persons, or absentees, and he produced unto me, notary, the tax receipts required by law. According to a certificate of the recorder of mortgages for the parish of Orleans, annexed to said sale to said Mandal, it appears that said property is free from encumbrance
192 in the name of said Clew, with the exception of the draining privilege, of which said purchaser binds himself to pay the balance to become due thereon. And by reference to an act passed before C. H. T. Collis, commissioner of Louisiana in Philadelphia, under date of the 31st January, 1866, annexed to said sale to Mandal, it appears that Mistress Marie Philomene Goulard, wife of said Clew, has made renunciation to all her rights on the property of her said husband.

And, also, personally came and appeared Albin Rochereau, of this city, attorney in fact of said Mistress Clew, duly appointed by said act of the 31st January, 1866, who, having taken cognizance of the present sale, declared that, by virtue of the powers in him vested by his said constituent, he does by these presents, in her name and behalf, fully renounce and relinquish, in favor of said purchaser, all and singular the matrimonial, dotal, paraphernal, and other rights, claims, mortgages, and privileges, to which she is, or may be, entitled, by the laws of
193 this State, on the presently-sold property, whether by virtue of her marriage with said Clew, or otherwise, all which rights were fully explained to her at the time of her signing said act of procuration.

The U. S. internal revenue stamps of fifteen dollars and fifty cents, on this act, are hereto attached.

Done and passed in my office at New Orleans, aforesaid, on the day, month, and year before written, in the presence of Edward G. Gottschalk and James Fahey, competent witnesses, who sign these presents, with the said appearers and me, notary, after reading thereof.

(Signed) J. F. CLEW.
ALBIN ROCHEREAU.
HARLOW J. PHELPS.
E. G. GOTTSCHALK.
JAS. FAHEY.
S. MAGNER, *Not. Pub.*

A true copy. New Orleans, 16th February, 1869.
[SEAL.] (Signed) S. MAGNER,
Not. Pub.

[5c. int. rev. stamp affixed and cancelled.]

Document A, referred to in the foregoing statement of facts and made part thereof.

OFFICE OF REGISTER OF CONVEYANCES,
194 PARISH OF ORLEANS,
New Orleans, 2d January, 1871.

This is to certify that, according to the records of this office, *that* on the 31st March, 1866, recorded in book 91, folio 150, a certain judgment of the 2d district court dated 29th March, 1866, decreeing that Ferdinand Clew be discharged from all further trust and liabilities as dative testamentary executor of his deceased wife, Elizabeth Clew, and that he be recognized as universal legatee of his said deceased wife the said Elizabeth Clew, and as such be put in possession of all the property left by said deceased, and more especially of the property described in the inventory made of said estate.

In faith whereof, I have set my hand and affixed the seal of my office this 2d day of January, 1871.

[SEAL.] (Signed) C. B. FISH,
D'y R.

Document G, referred to in the foregoing statement of facts and made part thereof.

195 OFFICE OF REGISTER OF CONVEYANCES,
PARISH OF ORLEANS,
New Orleans, 5th January, 1871.

This is to certify that, according to the records of the conveyance office in and for the parish of Orleans, it does appear that by act before Selim Magner, notary public, dated 6th April, 1866, recorded in said office on the 11th April, 1866, in book 689, folio 501, that John F. Clew, of this city, did transfer and sell to Harlow J. Phelps, also of this city, eight lots of ground, with all the improvements thereon, being in the fourth district, designated by numbers 1 to 8 inclusive, in the square bounded by Magazine, Constance, Philip, and First streets.

Furthermore certify that said sale was made for the sum of fifteen thousand three hundred dollars, ($15,300,) which were paid cash by said purchaser as stated in the record.

In faith whereof I have set my hand and affixed the seal of my office on the 5th day of January, 1851.

[SEAL.] (Signed) C. B. FISH,
D'y R.

196 *Document N, referred to in the foregoing statement of facts and made part thereof.*

OFFICE OF REGISTER OF CONVEYANCES,
PARISH OF ORLEANS,
New Orleans, 2d January, 1871.

This is to certify that, according to the records of this office, that on the 2d May, 1866, recorded in book 91, folio 219, a certain i'denture, made

the 8th Sept'r, 1864, between John F. Clew, of the State of New York, and Laura S. Taylor, wife of James B. Taylor, Martha J. Devlin, wife of John E. Devlin, Albert Day, and Alfred R. Day, heirs-at-law of Elizabeth Clew, deceased, formerly the wife of said J. F. Clew, it does appear that the said J. F. Clew did remise, released, and quit-claimed in favor of said above-named parties, all his rights, both at law and equity, as well in possession as in expectancy, of all and singular the real estate of which the said Elizabeth Clew, his said wife, died possessed of.

In faith whereof I have set my hand and affixed the seal of my
197 office this 2d day of January, 1871.

[SEAL.] (Signed) C. B. FISH,
D'y R.

Petition in suit No. 9163, in U. S. district court, referred to in the foregoing statement of facts, and made part thereof.

To the honorable the judge of the district court of the United States for the State and district of Louisiana:

The petition of James B. Taylor and his wife, Laura S. Taylor, and John C. Devlin his and wife, Martha J. Devlin, all residents of the city of New York and citizens of the State of New York, respectfully represents: That in the year 1859 Elizabeth Clew died in the city of New York, leaving a large real and personal estate situated in the cities of New York and New Orleans, a full inventory of which estate in the city of New Orleans is on file in the records of the second district court of the city of New Orleans in the suit No. 15285, entitled the succession of
198 Elizabeth Clew, and a copy of which is hereto annexed; that at the time of her death she was the wife of one John F. Clew, of said city of New York; that she left, at her decease, a paper purporting to be her last will and testament, a copy of which is on file in records of aforesaid cause in aforesaid court of New Orleans; that said paper was admitted to probate as the last will and testament of said Elizabeth Clew by the surrogate of the city and county of New York, State of New York; but that your petitioners, with others, took an appeal from the decision of the surrogate admitting said will to probate, to a court of competent jurisdiction, to wit, the supreme court of New York, and the probate of said will was duly set aside and annulled, and has never since been probated or made valid in any manner whatever, a copy of all which proceedings will be produced in due time. That Laura S. Taylor and Martha J. Devlin, with Albert Day and Alfred R. Day, were her only surviving sisters and brothers at the time of said
199 Elizabeth Clew's decease, and as such her sole heirs, she leaving no father or mother or children; and that the said Alfred R. Day and Albert Day have duly conveyed to your petitioners all their interest in the succession of said Elizabeth Clew. And your petitioners further represent that after said will was annulled on the 8th day of September, A. D. 1864, with a view of affording him some compensation for the loss of his bequests, they paid to said John F. Clew the sum of thirty thousand dollars in cash, and that he executed to them a release of any claim he might have to said succession, a copy of which will be produced in due time; but your petitioners aver that he had no claim whatever to said succession. And your petitioners further represent that the said John F. Clew, upon the 25th day of January, 1861, by falsely and fraudulently representing to the honorable the second district court of the city of New Orleans that the said will of the said Elizabeth Clew

had been duly probated in the city of New York, obtained
200 an order to approve, register, and execute said will, without any notice to your petitioners thereof; and, by false and fraudulent representations and by other ill-practises, without notice to your petitioners, did, on the 1st of March, 1866, obtain the judgment of the honorable the second district court of New Orleans, declaring him to be the universal legatee of his deceased wife, said Mrs. Elizabeth Clew, and, as such, that he be put in possession of said estates in city of New Orleans; all of which fraudulent acts of said John F. Clew have come to the knowledge of your petitioners within the last year.

And your petitioners represent that the said John F. Clew, not having any right or title to any of the said estate, did, upon the 11th April, 1866, sell and convey to Harlow J. Phelps, of the city of New Orleans, a portion of the aforesaid real estate, as follows, to wit:

Eight certain lots of ground, (by act of sale passed before S. Magner, notary public, on April 6th, 1866, in the city of New Orleans,) with
201 all the improvements thereon, situate in the fourth district of the city of New Orleans, in the square bounded by Magazine, Constance, Live Oak, Philip, and First street, designated as lots No. one to eight inclusive, on a plan deposited in the office of S. Magner as plan No. 109 in square bounded by Magazine, Constance or Live Oak, Philip, and First streets, according to which plan said lots measure as follows, to wit: Lots No. one to six inclusive measure each 30 feet 5 inches front on Magazine, the same width in rear, and 130 feet deep between parallel lines, lot No. 1 forming corner of First and Magazine street; lots Nos. 7 & 8 forming one lot on same plan, measure together twenty-seven feet six inches front on First by a depth of 182 feet 6 inches between parallel lines.

Your petitioners further represent that the said John F. Clew opened the succession of the said Elizabeth Clew in the said second district court of the city of New Orleans in the year 1860, and by false
202 and fraudulent means obtained other orders and decrees from the said court; that the order and decree putting him in possession of the estate of said Elizabeth Clew was obtained by false and fraudulent means, and that the said John F. Clew had no right, title, or interest in the real estate so conveyed, or in any portion thereof, and that, at the time of said sale and conveyance of aforesaid property to Harlow J. Phelps, the said John F. Clew had no right, title, or interest to the said property, and that it was and is the property of your petitioners.

Your petitioners now represent that Harlow J. Phelps was duly adjudged a bankrupt on the day of , 1868, and that E. E. Norton has been appointed the assignee in bankruptcy of said bankrupt, all of which proceedings were under act of Congress, know as the bankrupt act, and were had in the State of Louisana.

Your petitioners represent that Harlow J. Phelps and E. E. Norton are residents and citizens of the city of New Orleans, State of Louisiana, and that E. E. Norton, assignee, has possession of said
203 property.

Wherefore, the premises considered, your petitioners pray that E. E. Norton, the assignee in bankruptcy of Harlow J. Phelps, bankrupt, may be cited to appear and answer hereto, and that, after all due proceedings had, that judgment may be rendered in favor of your petitioners and against said E. E. Norton, as said assignee of Harlow J. Phelps, decreeing to your petitioners in the full right, title, and interest of ownership, the aforesaid real estate conveyed as aforesaid by said John F. Clew, to Harlow J. Phelps, by act before S. Magner, notary

public, on April 6th, 1866, and condemning him to pay over to your petitioners all the rents, profits, and revenues arising or accruing from, or due on, the said real estate from the 6th day of April, 1866, until possession of same be to them given, and they pray for costs, and for all general and equitable relief needful in the premises, and as in duty bound will ever pray, &c.

(Signed) H. D. STONE,
Att'y for Pl'ffs.

204 *Petition and citations in case No.* 15285, *referred to in the foregoing statement of facts, and made a part thereof.*

Petition of A. F. Cochran, to be recognized, &c., and to be put in possession.—Filed May 19th, 1870.

No. 15285.—Succession of Elizabeth Clew.—Second district court for the parish of Orleans.

To the honorable Louis Duvigneaud, judge of the second district court for the parish of Orleans:

The petition of Asa F. Cochran, of the city of New Orleans, with respect represents that he is the agent and attorney in fact for Laura S. Taylor, and James B. Taylor, her husband, and assignee of Alfred R. Day, and Albert Day, and Martha Josephine Devlin, and John E. Devlin, her husband, and assignee of the undivided one-fourth of the succession of Elizabeth Clew, from said James B. Taylor, of the city, county, and State of New York. Petitioner further shows that the succession of Elizabeth Clew was opened in this honorable court on the 19th of March, 1859; that John F. Clew qualified as testamentary executor thereof on the 26th of January, 1861, and that said succession consists of the following described property, according to the inventory herein filed, to wit:

205

Six lots of ground, with the improvements thereon, situated in the faubourg Livandais, fourth district of this city, in the square No. fifty-five, on the original plan of said faubourg, which is bounded by Magazine, Live Oak, First, and Philip streets, the said lots being designated by the Nos. one, two, three, four, five, and six, on a plan drawn by Henry Moelhausen on the 5th May, 1846, and deposited in the office of L. R. Kenny, late notary public in the parish of Jefferson, in this State, adjoining each other, and measuring each thirty feet five inches front on Magazine street, by one hundred and thirty feet in depth, between parallel lines. Another lot of ground, with the improvements thereon, situated in the same square adjoining the lots above described, and measuring thirty-seven feet six inches front, on First street, between Live Oak and Magazine streets, by a depth of one hundred and eighty-two feet six inches between parallel lines.

206

Two lots of ground, with the improvements thereon, situated in the fourth district of this city, and designated by the Nos. three and four, of square No. twenty, on the original plan of said faubourg, lot No. three having thirty-seven feet eleven inches front on Magazine street, by one hundred and fifty-eight feet three inches in depth, between parallel lines, and lot No. four measuring thirty-seven feet eleven inches front on Magazine street, by one hundred and fifty-eight feet three inches in depth on the side adjoining lot No. three; thence on the line dividing it from other property in the rear, forty-nine feet five inches, till it reaches the property of Mrs. Livandais; thence on the line divid-

ing it from said property, one hundred and fifty-eight feet seven inches, till it reaches the front on Magazine street.

207 Two lots of ground, with the improvements thereon, situated in the fourth district, and designated by the No. one and two of the square bound by Eighth, Levee, and Seventh streets, and the public road, on a plan drawn by Harrison on the 1st May, 1844, and annexed to an act passed before J. B. Marks, notary; lot No. one measuring twenty-six feet two and a half lines front, on Levee streets, one hundred and twenty-one feet six inches in depth, and front on Eighth street one hundred and twenty-two feet ten inches, and four lines in depth, on the line dividing it from lot No. two, and twenty-six feet four inches and a half line in width, in the rear and front on the public road; lot No. two measuring twenty-six feet two and a half lines front on Levee street, one hundred and twenty-two feet ten inches and four lines in depth on the line dividing it from lot No. one, one hundred and twenty-four feet three inches on the opposite side line, and twenty-six feet four inches and a half line in width in the rear and front on the public road.

208 Two lots of ground, with the improvements thereon, situate in the fourth district, in the square bounded by Seventh, Eighth, and Levee streets and the public landing, and designated by the Nos. one, two, three, and four, on a plan drawn by Moelhausen on the 21st January, 1846, and deposited as plan No. 25, in the office of G. R. Stringer, late notary in this city; lot No. one having twenty-six feet four inches and one line front on the public landing, by sixty-three feet six inches on the line next to Seventh street, sixty-three feet three inches and one line on the line dividing it from lot No. two, and twenty-six feet two inches and one and a half lines on the rear line dividing it from lot No. four.

Lot No. two having twenty-six feet four inches and one line on the public landing, by sixty-three feet three inches and one line in depth on the line dividing it from lot No. one, sixty-three feet one inch and four lines in depth on the line next to Eighth street, and twenty-six

209 feet two inches and one and a half line in the rear, on the line dividing it from lot No. three.

Lot No. three having twenty-six feet and two lines front on Levee street, by sixty-three feet one inch and four lines in depth on the line next to Eighth street, sixty-three feet three inches and one line on the line dividing it from lot No. four, and twenty-six feet two inches and one and a half line on the rear line dividing it from lot No. two.

And lot No. four having twenty-six feet and two lines front on Levee street, by a depth of sixty-three feet three inches and one line on the line dividing it from Lot No. three, sixty-three feet and six lines on the line next to Seventh street, and twenty-six feet two inches and one and a half line in the rear.

Two lots of ground, with the improvements thereon, situated in the fourth district, and designated by the letters A R and A S on a plan drawn by Buisson and deposited in the office of G. R. Stringer, late notary lot A R having fifty-one feet one inch front on Levee street

210 and fifty feet front on the Mississippi River, by a depth of two hundred and three feet on one side and of one hundred and ninety-eight feet six inches on the other side; and lot A S having fifty-one feet one inch front on Levee street, fifty feet front on the river Mississippi, by a depth of one hundred and ninety-eight feet six inches on one side, and of one hundred and ninety-four feet on the other side.

Two lots of ground situate in the fourth district, in square No. sixty,

which is bounded by Live Oak, Magazine, Sixth, and Washington streets. The said lots are designated by Nos. thirty-one and thirty-two; they adjoin each other and measure each thirty feet front on Live Oak street, by a depth of one hundred and fifty-eight feet two inches between parallel lines.

Two lots of ground, with the improvements thereon, situate in the fourth district, in said square No. sixty, and designated by the
211 Nos. twenty-nine and thirty, having each thirty feet front on Live Oak street, by one hundred and fifty-eight feet two inches in depth between parallel lines.

Cash in the hands of J. P. Benjamin, with 8 % interest thereon, two thousand two hundred and three dollars and fifty-five cents, ($2,203 55.)

Now petitioner alleges that the heirs whom he represents opposed the execution of the pretended last will and testament of said Elizabeth Clew, dec'd, and also the appointment of said John F. Clew as executor, on the ground that the said pretended will was null and void by the laws of the State of New York, where the will was made and the domicil of the testatrix, and had been by her subsequently revoked during her lifetime.

That said heirs also opposed the application of John F. Clew for letters of executorship in this honorable court, notwithstanding which said Clew was appointed executor and confirmed as such; that said executor,
212 John F. Clew, subsequently acting in bad faith, did illegally and improperly obtain an erroneous and improvident order of this honorable court, without any citation whatever or notice to said heirs, recognizing him as universal legatee of said succession, and placing him in possession of the same, although it appeared, from the face of the proceedings on file in this honorable court in said succession, that an appeal was then pending and undecided from the probate or surrogate court in and for the county of New York, to the supreme court of the State of New York, which appeal has since been decided, declaring said pretended will null and void, the same having been revoked during the lifetime of the testatrix, and recognizing the parties represented by your petitioner as the only lawful heirs of said Elizabeth Clew, deceased, all of which facts heretofore alleged will more fully appear from the documents, marked A, B, C, D, E, & F, herewith filed and made part of this petition.

Petitioner further represents that the public administrator, P. B.
213 Foulke, has been appointed to represent the vacant succession of John F. Clew, deceased.

Wherefore petitioner prays that the order or decree of this honorable court, dated March 29th, 1866, purporting to recognize John F. Clew as universal legatee, and, as such, putting him in possession of the succession of Elizabeth Clew, be vacated and set aside as null and void, and as having been erroneously and improvidently granted; that the judgment of the supreme court be ordered to be executed and enforced; that petitioner be recognized as agent and attorney in fact of the legal heirs and assignees of the legal heirs of said estate, and, as such, that he be placed in possession of the succession of Elizabeth Clew, deceased; that the public administrator, P. B. Fouke, and the attorney for absent heirs in the succession of John F. Clew, viz, Jh. Duvigneaud, be cited hereto.

Petitioner prays for all such other orders and decrees as the law requires, and for general and equitable relief.

214 (Signed) WALLACE & HANDLIN, *Att'ys.*

Citation on above petition.

No. 15285.—Succession of Elizabeth Clew.—State of Louisiana, second district court for the parish of Orleans.—In the city of New Orleans.

M. P. B. Fouke, public administrator for the parish of Orleans, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable L's Duvigneaud, judge of the said court, the 25th day of May, in the year of our Lord 1870.

[SEAL.] (Signed) M. O. TRACEY, *Clerk.*

Sheriff's return on above citation.

215 Received May 26th, 1870, and on the 27th day of May, 1870, served a copy of the within citation and accompanying petition on P. B. Foulke, esq., public administrator, by a personal service on J. H. New, esq., his attorney, who accepted the service. Returned May 27th, 1870.

(Signed) J. W. T. LUCK,
D'y Sheriff.

Citation on foregoing petition.

No. 15285.—Succession of Elizabeth Clew.—State of Louisiana, second district court for the parish of Orleans.—In the city of New Orleans.

M. Jh. Duvigneaud, attorney for absent heirs of the above succession, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court for the parish of Orleans in ten days after the service
216 hereof.

Witness the honorable L's Duvigneaud, judge of the said court, the 25th day of May, in the year of our Lord 1870.

[SEAL.] (Signed) M. O. TRACEY, *Clerk.*

Sheriff's return on above citation.

Received May 26th, 1870, and on the 27th day of May, 1870, served a copy of the within citation and accompanying petition on Jh. Duvigneaud, esq., in person, attorney for absent heirs. Returned May 27th, 1870.

(Signed) J. W. F. LUCK,
D'y Sheriff.

Document B, referred to in the foregoing statement of facts, and made part thereof.

State of Louisiana, second district court for the parish of Orleans.—33711.—Succession of John F. Clew.

Petition praying that P. B. Foulke, public administrator, be
217 appointed dative testamentary executor. Filed April 9th, 1870.

To the honorable Louis Duvigneaud, judge of the second district court for the parish of Orleans:

The petition of J. M. Wells, of the city of New Orleans, with respect, represents that John F. Clew departed this life in the city of Philadelphia, Pa., on or about the day of , 1866; that it is necessary to appoint the public administrator as dative testamentary executor of said succession, in conformity with existing law, there being no legal representatives of said succession or known heirs present or represented in the State of Louisiana; that said John F. Clew, as executor of the succession of Elizabeth Clew, opened in this honorable court, has left the same unsettled, and that it is necessary to have a representative of said executor appointed and qualified. Wherefore petitioner prays that P. B. Foulke, public administrator, be appointed dative testamentary executor of the succession of John F. Clew, deceased, and that
218 letters issue to him as such, and for general and equitable relief.

(Signed) J. MADISON WELLS,
In proper person.

Affidavit annexed to petition for appointment of dative testamentary executor.

STATE OF LOUISIANA,
Parish of Orleans:

Personally came and appeared before me, the undersigned, a justice of the peace in and for the parish and State above written, Asa F. Cochran, who, being duly sworn, deposes and says that, to best of his knowledge and belief, John F. Clew died in the city of during the year 1866, and that authentic documents and common report places the fact of his death beyond a doubt in his mind.

(Signed) A. F. COCHRAN.

NEW ORLEANS, *April 9th*, 1870.

Sworn and subscribed before me to-day.

(Signed) A. SHELLEY,
Second Justice of the Peace.

219 *Order appointing O. B. Foulke dative testamentary executor.*

Let P. B. Foulke, esq., public administrator for the parish of Orleans, be ordered to assume the administration of this succession, and proceed with its settlement according to law.

NEW ORLEANS, *April 9th*, 1870.

Petition for registry of will and appointment of testamentary executor and attorney for absent heirs.—Filed May 16th, 1870.

No. 33711.—Succession of John F. Clew.

To the honorable Lewis Duvigneaud, judge of the second district court for the parish of Orleans:

The petition of J. M. Wells, of the city of New Orleans, with respect, represents that heretofore, on the 9th day of April, 1870, he applied to this honorable court for the appointment of P. B. Foulke as dative testamentary executor of the last will and testament of John F. Clew, deceased; that he has since received a certified copy of said will,
220 which he herewith files, and offers for registry and execution.

Wherefore petitioner prays that said last will and testament of John F. Clew, deceased, be registered and executed, and that P. B. Foulke, the public administrator, be appointed and qualified as dative testamentary executor thereof; that an attorney for absent heirs be appointed, and for all such other orders and decrees as may be found requisite, and for general and equitable relief.

(Signed) J. E. WALLACE, *Att'y.*

Order to register will and appointing dative testamentary executor and attorney for absent heirs.

Let the last will and testament of the late J. F. Clew, deceased, be registered and executed, and let P. B. Foulke, public administrator, be appointed dative testamentary executor of said will, and let Jh. Duvigneaud, esq., att'y and counsellor-at-law, be appointed to represent the absent heirs of the deceased.

New Orleans, May 16th, 1870.

221 (Signed) LOUIS DUVIGNEAUD, *Judge.*

Notice of appointment of attorney of absent heirs.

State of Louisiana, second district court of New Orleans.—No. 33711.—Succession of John F. Clew.

To Jh. Duvigneaud, esq., attorney and counsellor-at-law:

SIR: Please to take notice that you have been appointed to represent the absent heirs of the deceased in the above-entitled succession.

New Orleans, May 17th, 1870.

(Signed) W. G. BOYLAN,
D'y Clk.

Sheriff's return on notice to attorney of absent heirs.

Received May 17th, 1870, and on the 18th day of the same month and year served a copy of the within notice of appointment on Joseph
222 Duvigneaud, esq., in person. Returned May 18th, 1870.

(Signed) J. W. T. LUCK,
D'y Sheriff.

Will and testament.—Filed May 16th, 1870.

No. 33711.—Succession of John F. Clew.

Be it remembered that I, John F. Clew, a native of France, but resident in the State of New York, have made, published, and declared this only to be my last will and testament, revoking all other wills by me heretofore made.

Having full confidence in the love and affection of my beloved wife, Philomena M. C. Clew, for myself and for our children, I do hereby give, devise, and bequeath unto her, absolutely and in fee, all and singular my estate, real, personal, and mixed, wheresoever the same may be situated and howsoever it may be invested. And I do hereby constitute and appoint her to be sole executor of this my will.

223 Done at Philadelphia, in the State of Pennsylvania, the eleventh day of January, A. D. 1865.

[SEAL.] (Signed) JOHN F. CLEW.

Signed, sealed, published, and declared by the said John F. Clew as his last will and testament, in our presence.

(Signed) CHARLES WALLY.
" THOMAS J. FENNIMORE.
" THEO. CUYLER.

CITY AND COUNTY OF PHILADELPHIA,
Register's Office, Aug. 27th, 1866:

Then personally appeared Thomas J. Fennimore and Theo. Cuyler, two of the subscribing witnesses to the foregoing last will of John F. Clew, deceased, and on their solemn oaths did say that they were present and did see and hear John F. Clew, deceased, the testator therein named, sign, seal, publish, and declare the same as and for his last will and testament, and that at the doing thereof he was of sound disposing mind, memory, and understanding, to the best of their knowledge and belief.

224 (Signed) THOMAS J. FENNIMORE.
" THEO. CUYLER.

Sworn and subscribed before me, the date above.

(Signed) SAM'L LLOYD,
Dep. Register.

Executor's oath.

CITY AND COUNTY OF PHILADELPHIA,
Register's Office, August 27th, 1866:

I do swear that, as the executrix of the foregoing last will and testament of John F. Clew, deceased, I will well and truly administer the goods and chattels, rights and credits of said deceased agreeably to law, and I will comply with the provisions of the law relating to collateral inheritance.

(Signed) PHILOMENA M. C. CLEW.

Sworn and subscribed before me the date above, and letters testamentary granted unto her.

(Signed) SAM'L LLOYD,
Dep. Register.

COMMONWEALTH OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA,
Register's Office, May 7th, 1870:

225 I, William A. Leech, register of wills for the city and county of Philadelphia, in the commonwealth of Pennsylvania, do hereby certify the foregoing to be a true and accurate copy of the last will and testament of John F. Clew, deceased, together with the probate thereof, upon which letters testamentary were duly granted unto Philomena M. C. Clew, the executrix therein named, on the twenty-seventh day of August, 1866, as the same remains on file and of record in this office.

In testimony whereof witness my hand and seal of office, at Philadelphia, the date above.

[SEAL.] (Signed) WILLIAM A. LEECH,
Register.

PENNSYLVANIA,
City and County of Philadelphia, ss:

I, Joseph Allison, esq., president of the first judicial district of Pennsylvania, and presiding judge of the court of common pleas, orphans' court, and court of general quarter sessions of the peace for the city and county of Philadelphia, do certify that William A. Leech,
226 by whom the annexed record, certificate, and attestation were made and given, and who in his own proper handwriting has thereunto subscribed his name and affixed his official seal, was, at the time of so doing, and now is, register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the commonwealth of Pennsylvania, duly commissioned and qualified, to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as thereout, and that the said record, certificate, and attestation are in due form, and made by the proper officer.

In testimony whereof I have hereunto set my hand the tenth day of May, eighteen hundred and seventy.

(Signed) JOSEPH ALLISON.

CITY & COUNTY OF PHILADELPHIA, *ss:*

I, , esquire, prothonotary of the court of common pleas for the city and county of Philadelphia, do certify that the honora-
227 ble Joseph Allison, esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was, at the time of making thereof, and still is, president of the first judicial district of Pennsylvania, and president judge of the court of common pleas, orphans' court, and court of general quarter sessions of the peace for the city and county of Philadelphia, duly commissioned and sworn, to all whose acts as such full faith and credit are and ought to be given as well in courts of justice as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court the tenth day of May, eighteen hundred and seventy.

[SEAL.] (Signed) R. DONAGAN, *Prothonotary.*

Rule to set aside order appointing dative testamentary executor.

No. 33711. Succession of John F. Clew.—Filed June 14, 1870.—
228 Second district court, parish of Orleans.

On motion of Hays & New, of counsel for public administrator, it is

ordered that J. M. Wells show cause, on Wednesday, 15th inst., at 11 o'clock, why the order of the court appointing the public administrator dative testamentary executor herein should not be set aside, as having been improvidently signed, not being authorized by law, there being no property within the jurisdiction of this court to give it jurisdiction, or on which the public administrator can act.

Order, rule continued.—Minutes, June 15, 1870.

No. 33711.—Succession of John F. Clew.

The rule taken herein June 14th instant, came up this day for trial. Present: Hays & New, for plaintiff in rule, Wallace & Handlin for defendant therein, when, after hearing counsel, it is ordered that the matter be continued indefinitely.

229 *Petition for inventory.—Filed June 15th,* 1870.

No. 33711.—Succession of John F. Clew.—Second district court.

The petition of P. B. Foulke respectfully represents that an inventory is necessary, in order to determine whether there is property within the jurisdiction of this honorable court. Wherefore he prays that an inventory be taken according to law.

(Signed) HAYS & NEW, *Att'ys.*

Order for inventory.

Let the inventory within prayed for be taken by A. D. Doriocourt, notary public, in the presence of all the parties interested, and let J. L. Lewis and J. Bayon be appointed and sworn as appraisers, to value the property to be inventoried.

New Orleans, June 15, 1870.

(Signed) LOUIS DUVIGNEAUD, *Judge.*

Oath of appraisers.—Filed June 16th, 1870.

230 No. 33711.—Succession of John F. Clew.—State of Louisiana, Second district court for the parish of Orleans.—Succession of John F. Clew.

Before me, W. G. Boylan, deputy clerk of the second district court for the parish of Orleans, personally came and appeared J. L. Lewis & J. Bayon, who solemnly swear that they will well and faithfully perform all and singular the duties of appraisers, so help them God.

(Signed) JNO. L. LEWIS.
" J. BAYON.

Sworn to and subscribed before me, New Orleans, June 16th, 1870.

(Signed) W. G. BOYLAN, *D'y Clerk.*

Petition for homologation of inventory.—Filed July 1st, 1870.

Second district court for the parish of Orleans.—No. 33711.—Succession of John F. Clew.

The petition of the undersigned, attorney and counsellor, ap-
231 pointed by this honorable court to represent the absent heirs of the above entitled estate, respectfully shows that, pursuant to an order from this honorable court, dated 15th June, 1870, an inventory of property belonging to this estate has been taken by A. D. Doriocourt, the not. pub., an authentic copy whereof is hereto annexed and made part of this petition. Wherefore he prays for the filing, recording, and homologation of said inventory.

(Signed) J'H DUVIGNEAUD,
Att'y for absent heirs.

Order homologating inventory.

Let the inventory within referred to be approved and homologated.
New Orleans, July 1st, 1870.

(Signed) LOUIS DUVIGNEAUD,
Judge.

Inventory.—Filed July 1st, 1870.

No. 33711.—Succession of John F. Clew.

STATE OF LOUISIANA,
Parish of New Orleans, City of New Orleans:

232 Be it known that on this day, the twenty-second of June, in the year one thousand eight hundred and seventy, at ten o'clock a. m., by virtue of, and in obedience to, an order rendered by the honorable judge of the second district court for the parish of Orleans, dated 15th June, 1870, in the petition of P. B. Foulke, showing that in order to determine whether there is property within the jurisdiction of this honorable court belonging to the succession of John F. Clew, an inventory is necessary, said order authorising the undersigned notary to take said inventory, as appears by the duly certified copy of the said petition and order of court, hereto annexed for reference, and as part hereof.

I, Andro D. Doriocourt, notary public, duly commissioned and sworn for the parish and city of New Orleans, State of Louisiana, did at the request of Joseph Duvigneaud, esq., att'y-at-law, in this city, the counsel of the absent heirs, appointed by the honorable judge of the second
233 district court to act as such, proceed to take in my office, No. 135 Royal street, an inventory of property of said deceased, in the presence of said Joseph Duvigneaud, acting in his capacity aforesaid, and Jerome Bayon & J. L. Lewis, appraisers appointed by the court to value the property to be inventoried, P. B. Foulke, public administrator, and Antoine Doriocourt and Antoine St. Amand, competent witnesses, residing in this city, by me requested to attend the taking of this inventory, and we proceeded as follows:

Here the said Joseph Duvigneaud declared that he was informed that the deceased was put in possession of certain real estate by a decree rendered by the second district court, in the succession of Elizabeth

Clew, on the 29th March, 1866, case 15285; that part of the property mentioned in the said judgment sending him in possession had been sold, and that the following and hereafter described property still stand in the name of the said deceased:

Two lots of ground situate in the fourth district, designated by the numbers one and two of the square, bounded by Eighth, Levee,
234 Seventh streets, and the public road, as per plan made by Harrison the 1st May, 1844, annexed to an act passed before J. B. Marks, notary; lot No. 1, measuring twenty-six feet two and a half lines front on Levee street, one hundred and twenty-one feet six inches deep, and front on Eighth street, one hundred and twenty-two feet ten inches 4 lines deep on the line dividing it from lot No. 2, and twenty-six feet 4 inches and a half line in width in the rear, and front on the public road; lot No. 2, measuring twenty-six feet 2½ lines front on Levee street, one hundred and twenty-two feet ten inches and 4 lines on the line dividing it from lot No. 1, one hundred and twenty-four feet 3 inches on the opposite side line, and twenty-six feet 4 inches and a half in width on the rear and front on the public road.

Four lots of ground in the same square, designated by the numbers one, two, three, and four on a plan drawn by Moelhausen 21st January, 1846, deposited as plan No. 35 in the office of G. R. Stringer,
235 late notary, No. 1 having twenty-six feet 4 inches one line front on the public landing, by sixty-three feet 6 inches on the line next to 7th street, sixty-three feet 3 inches 1 line on the line dividing it from lot No. 2, twenty-six feet 2 inches and 1½ lines on the line dividing it from lot No. 4.

No. 2 having twenty-six feet four inches 1 line on the public landing, sixty-three feet 3 inches 1 line deep on the line dividing it from lot No. 1, sixty-three feet 1 inch 4 lines in depth on the line next to 8th street, and twenty-six feet 2 inches and 1½ line in the rear on the line dividing it from lot No. 3. The lot No. 3 having twenty-six feet 2 lines front on Levee street, by sixty-three feet 1 inch 4 lines in depth on the line next to 8th street, sixty-three feet 3 inches 1 line on the line dividing it from lot No. 4, and twenty-six feet two inches one and a half line on the rear line dividing it from lot No. 2.

Lot No. four, having twenty-six feet 2 lines front on Levee street, by a depth of sixty-three feet 3 inches and 1 line on the line dividing it from lot No. 3, sixty-three feet and 6 lines on the line next to
236 Seventh street, and twenty-six feet 2 inches and 1½ line in the rear.

Two lots of ground, designated by the letters A R & A S, on a plan drawn by Buisson and deposited in the office of G. R. Stringer, notary, lot A R having fifty-one feet 1 inch front on Levee street, fifty feet front on the Mississippi River, by a depth of two hundred and three feet on one side and one hundred and ninety-eight feet six inches on the other side; and lot A S having fifty-one feet 1 inch front on Levee street, fifty feet front on the Mississippi River, by a depth of one hundred and ninety-eight feet six inches on one side and one hundred and ninety-four feet on the other side, upon which lot stand an old building of no value. And the appraisers, after having carefully examined the above property, by repairing on the same for that purpose, and examined a sketch submitted to them upon which said lots figure, said lots now used as a stave yard, they were appraised in block by the said appraisers at the
237 sum of eight thousand dollars, ($8,000 00;) and there being nothing else to be inventoried herein, I made the "Recapitulation:" Real estate appraised at the sum of eight thousand dollars, ($8,000 00.)

Thus done and closed, the day, month, and year above written, the present inventory, amounting to the sum of eight thousand dollars, and the parties have signed after reading.

(Signed) P. B. FOULKE.
J. BAYON,
JNO. L. LEWIS,
J. DUVIGNEAUD,
Att'y for absent heirs.
ANTOINE ST. AMAND.
ANTOINE DORIOCOURT.
ANDRE D. DORIOCOURT,
Not'y Public.

A true copy.
[SEAL.] (Signed) A. D. DORIOCOURT,
Not'y Pub.

Order to fix rule to set aside appointment of dative testamentary executor.—Minutes, Nov'r 30th, 1870.

No. 33711.—Succession of John F. Clew.

On motion for counsel for defendant in rule taken herein, June 14th, 1870, it is ordered that the same be now renewed and fixed for trial
238 for Wednesday, Dec'r 7th, prox'o, at eleven o'clock a. m., and that plaintiff be notified hereof.

Consent to dismiss rule.

No. 33711.—Succession of John F. Clew.—Second district court of New Orleans.

It is agreed that the rule opposing the appointment of the public administrator herein be dismissed without prejudice to the rights of the heirs of Elizabeth Clew, deceased.

(Signed) P. B. FOULKE,
Public Administrator.
" WALLACE & HANDLIN, *For.*

Order dismissing rule.—Minutes, November 30th, 1870.

No. 33711.—Succession of John F. Clew.

By the written consent of counsel, on file, it is ordered that the rule taken herein, June 14th, 1870, by the public administrator against J. M. Wells, to show cause why the order of this court appointing
239 him, the public administrator, dative testamentary executor herein should not be set aside, be and the same is now dismissed, without prejudice to the rights of the heirs of Elizabeth Clew, deceased.

Certificate.

STATE OF LOUISIANA,
Second District Court for the Parish of Orleans :

I hereby certify that the foregoing twenty-five pages contain a true and correct copy of all the documents filed and of all the proceedings had in the matter of the succession of John F. Clew, number 33711 of the docket of this court.

In testimony whereof I have hereunto set my hand and affixed the

seal of the said court, at the city of New Orleans, on the 20th day of December, in the year of our Lord one thousand eight hundred and seventy, and the ninety-fifth year of the Independence of the United States of America.

[SEAL.] (Signed) A. J. VILLERE,
D'y Clerk.

240 *Judgment referred to in the foregoing statement of facts, and made part thereof.*

Judgment.—No. 15285.—Succession of Elizabeth Clew.—Second district court of the parish of Orleans.

For the reasons assigned in the written opinion of the court this day delivered and on file, it is ordered, adjudged, and decreed that the order of judgment herein rendered and signed January 25th, 1861, admitting to registry and execution the pretended last will and testament of Elizabeth Clew, and the order or judgment dated and signed March 29th, 1866, putting J. F. Clew in possession of the succession of Elizabeth Clew, be cancelled and annulled, and it is ordered, adjudged, and decreed that the said Elizabeth Clew died intestate.

It is further ordered, adjudged, and decreed that Laura S. Taylor, wife of James B. Taylor, and Martha Josephine Devlin, wife of
241 John E. Devlin, all residents of the State of New York, Alfred R. Day, now deceased, and Albert Day, of the State of Vermont, be recognized as the sole heirs-at-law of the late Elizabeth Clew, each for the one-fourth part of her succession, and as such entitled to be put in possession of her estate.

That James B. Taylor and John E. Devlin be recognised as the assignees each for the undivided one-half part of Alfred R. Day's and Albert Day's interest in the succession of Elizabeth Clew, and that A. F. Cochran be recognised as the duly constituted agent and attorney-in-fact of Laura S. Taylor, James B. Taylor, Martha Josephine Devlin, and John E. Devlin, and as such that he be placed in possession of the succession of Elizabeth Clew, deceased.

Judgment rendered June 24th, 1870. Judgment signed June 29th, 1870.

(Signed) LOUIS DUVIGNEAUD, *Judge.*

Sale by Albert Day, and his wife Lydia E. Day, to James B. Taylor,
242 *referred to in the foregoing statement of facts, and made part thereof.*

This indenture, made the thirtieth day of July, in the year one thousand eight hundred and sixty-four, between Albert Day and Lydia Eliza Day, his wife, of Royalton, in the county of Windsor and State of Vermont, parties of the first part, and James B. Taylor, of the city, county, and State of New York, party of the second part, as follows, that is to say: Whereas Elizabeth Clew, the wife of John F. Clew, of the city of New York, (formerly the wife and widow of Samuel Broome, deceased,) departed this life at the city of New York on or about the sixth day of March, 1859, and having certain real estate owned and possessed by her in the States of New York, Louisiana, and Texas, amongst others some four hundred acres more or less of real estate at Hyde Park, near Poughkeepsie, in the county of Duchess, in the State of New York, and also certain real estate at New Orleans, in the State of Louisiana, and at Galveston, Texas, and other property, and

243 also leaving as her heirs-at-law two sisters and two brothers, viz, Albert Day, above named, and Alfred R. Day, of Baltimore, and Laura S., the wife of said James B. Taylor, and Martha Josephine, the wife of John E. Devlin, of the city of New York:

Now this indenture witnesseth, that the said parties of the first part, for and in consideration of the sum of ten dollars paid to them respectively by the said party of the second part, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, and also in consideration of the agreement of the said party of the second part, bearing even date herewith, to pay the sum of five thousand dollars, and such further contingent sums as therein mentioned, in manner and form as therein stated, have granted, bargained, sold, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, release, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all the estate, right, title, and interest whatsoever, at law or in equity, which the said Albert Day, one of the parties of the first
244 part, is seized of, or entitled to, as one of the heirs-at-law of the said Elizabeth Clew, deceased, and which the said Lydia Eliza Day, wife of the said Albert Day, is seized of, or is or may become entitled to as wife of the said Albert Day, in or to the undivided part or portion of all the said lands, personal property, and estate of every kind, which the said Albert Day was, is, or may be seized of or entitled to, as one of the said heirs-at-law of the said Elizabeth Clew, deceased, or which descended to or became vested in him on the death of said Elizabeth Clew, together with the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, to have and to hold the same to the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever.

And also that the said parties of the first part, and their heirs, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the herein granted premises, by, from, under, or in trust for them, shall and will, at all time
245 or times hereafter, upon the reasonably request and at the proper cost and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and effectually vesting and confirming the premises hereby granted or intended so to be, in and to the said party of the second part, his heirs and assigns forever, as by said party of the second part, his heirs and assigns, or his or their counsel, shall be reasonably advised, devised, or required.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) ALBERT DAY. [L. S.]
" LYDIA ELIZA DAY. [L. S.]

Sealed and delivered in the presence of—
(Signed) JOHN S. MARCY.
ESTHER E. MILLER.
HIRAM SPENCER.

[$10 00 in U. S. int. rev. stamps affixed and cancelled.]

246 STATE OF VERMONT,
County of Windsor, ss:

Be it remembered that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and sixty-four, before me, the

undersigned, a judge of the county court for the county of Windsor, in the State of Vermont, resident in said Vermont, and duly qualified and authorized under the laws of the State of Vermont to take the acknowledgment of deeds and instruments to be used and recorded therein, personally appeared Albert Day and Lydia Eliza Day, his wife, personally to me known to be the individuals described in and who executed the within conveyance, and acknowledged that they executed the same, and Lydia Eliza Day, the wife of Albert Day, on a private examination by me apart from her husband, and having the same fully explained to her, acknowledged that she signed, sealed, and delivered such conveyance freely and willingly and without any fear or compulsion of her husband, and that she wished not to retract it.

247 In witness whereof I have hereunto set my hand and affixed the seal of the said court the day and year aforesaid.

(Signed) JOHN S. MARCY,
Judge of Windsor County Court and ex-of. Justice of the Peace.

STATE OF VERMONT,
Windsor County, Clerk's Office, ss:

I, Norman Williams, county clerk, and clerk of the county court of the county of Windsor, (a court of record, having a seal as hereto attached,) do hereby certify that John S. Marcy, before whom the annexed deed was acknowledged, was at the time of taking such acknowledgment a judge of the county court and justice of the peace in and for said county, duly elected, sworn, and authorized to take the same, and that I am well acquainted with his handwriting, and verily believe that the signature to the certificate of acknowledgment on said deed is genuine, and that said deed is executed and acknowledged according to the laws of

248 this State.

In witness whereof I have hereunto set my hand and affixed my official seal at Woodstock in said county, this 25th day of August, A. D. 1864.

[SEAL.] (Signed) NORMAN WILLIAMS,
Clerk.

[5 c. int. rev. stamp affixed and cancelled.]

I, register of conveyances, certify that the above document was this day recorded in this office, in book 91, fo. 220.

New Orleans, 2d May, 1866.

[SEAL.] (Signed) PHI GUESNON,
D'y R'r.

Sale by Alfred R. Day to James B. Taylor, referred to in the foregoing statements of facts, and made part thereof.

This indenture, made the twenty-fifth day of October, in the year one thousand eight hundred and sixty-four, between Alfred R. Day, of Baltimore, in the State of Maryland, party of the first part, and James B. Taylor, of the city, county, and State of New York, party of the second part, as follows, that is to say:

Whereas Elizabeth Clew, the wife of John F. Clew, of the city

249 of New York, (formerly the wife and widow of Samuel Broome, deceased,) departed this life at the city of New York on or about the sixth day of March, 1859, and leaving certain real estate owned and possessed by her in the States of New York, Louisiana, and Texas,

amongst others, some 400 acres more or less of real estate at Hyde Park, near Poughkeepsie, in the county of Duchess, in the State of New York, and also certain real estate at New Orleans, in the State of Louisiana, and at Galveston, Texas, and other property, and also leaving as her heirs-at-law two sisters and two brothers, viz: Albert Day, of Royalton, Vermont, and Alfred R. Day, above named, and Laura S., the wife of said James B. Taylor, and Martha Josephine, the wife of John E. Devlin, of the city of New York:

Now this indenture witnesseth, that the said party of the first
250 part, for and in consideration of the sum of ten dollars paid to him by the said party of the second part, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, and also other considerations me thereunto moving, hath granted, bargained, sold, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, release, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all the estate, right, title, and interest whatsoever, at law or in equity, which the said Alfred R. Day, party of the first part, is seized of, or entitled to, as one of the heirs-at-law of the said Elizabeth Clew, deceased, in or to the undivided part or portion of all the said lands, personal property, and estate of every kind which the said Alfred R. Day was, is, or may be seized of or entitled to, as one of the said heirs-at-law of the said Elizabeth Clew, deceased, or which descended to or became vested in him on the death of said Elizabeth Clew, together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining, to have and
251 to hold the same to the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever.

And also that the said party of the first part, and his heirs and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest of, in, or to the herein-granted premises by, from, under, or in trust for him, shall and will at all time or times hereafter, upon the reasonable request and at the proper cost and charges in the law of the said party of the second part, his heirs and assigns, made, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and effectually vesting and confirming the premises hereby granted or intended so to be in and to the said party of the second part, his heirs and assigns, or his or their counsel, shall be reasonably advised, devised, or required.

252 In witness whereof the said party of the first part to these presents hath hereunto set his hand and seal the day and year first above written.

(Signed) ALFRED R. DAY. [L. S.]

Sealed and delivered in the presence of—
(Signed) W. H. HAYWARD.
(Signed) JAS. B. LATIMER.

STATE OF MARYLAND,
City of Baltimore, ss:

Before me, James B. Latimer, a commissioner duly appointed and commissioned by his excellency the governor of the State of Louisiana in and for the State of Maryland, residing in the city of Baltimore aforesaid, personally came Alfred R. Day, above named, who is personally known to me to be the party, grantor, named and described in the

foregoing deed, and acknowledged the signing, sealing, and delivery of the same to be his act and deed, for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed
253 my official seal as commissioner aforesaid this twenty-fifth day of October, eighteen hundred and sixty-four.

[SEAL.] (Signed) JAS. B. LATIMER,
Comm'r for the State of Louisiana.

[5c. int. rev. stamp affixed and cancelled.]

I, register of conveyances, certify that the above document was this day recorded in this office, in book 91, fo. 223.

New Orleans, 2d May, 1866,

[SEAL.] (Signed) PH. GUESNON,
D'y R'r.

Sale by James B. Taylor and wife to John E. Devlin, referred to in the foregoing statement of facts and made part thereof.

This indenture, made the first day of December, in the year one thousand eight hundred and sixty-four, between James B. Taylor, of the city, county, and State of New York, and Laura S. Taylor, his wife, of the first part, and John E. Devlin, of the same place, husband of Martha Josephine Devlin, part' of the second part, as follows, that is to
254 say:

Whereas Elizabeth Clew, the wife of John F. Clew, of the city of New York, (formerly the wife and widow of Samuel Broome, deceased,) departed this life at the city of New York on or about the sixth day of March, 1859, and leaving certain real estate owned and possessed by her in the States of New York, Louisiana, and Texas, to wit: some four hundred acres, more or less, of real estate at Hyde Park, near Poughkeepsie, in the county of Dutchess, and State of New York, and also certain real estate at New Orleans, in the State of Louisiana, and at Galveston, Texas, and also leaving as her heirs-at-law two sisters and two brothers, viz: Albert Day, of Royalton, Vermont, and Alfred R. Day of Baltimore, and the above named Laura S., the wife of said James B. Taylor, and Martha Josephine, the wife of John E. Devlin, of the city of New York. And whereas the said Albert Day and wife, by conveyance dated the thirteenth day of July, 1864, and the said Alfred R. Day, by conveyance dated the fifth day November, 1864,
255 have respectively conveyed to James B. Taylor, above named, their interest in said real estate, respectively. And whereas said Devlin has advanced one-half part of the consideration money and expenses to procure said conveyance of said Albert Day and Alfred R. Day: Now this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises and of the sum of ten dollars to them paid by the said party of the second part at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, release, convey, and confirm unto the said party of the second part, his heirs and assigns forever, the one undivided half part of all the estate, right, title, and interest whatsoever, at law or in equity, in the above described real estate which the said Albert Day and wife, and Alfred R. Day, in and by their said conveyance above mentioned, conveyed to the said James B. Taylor, one of
256 the parties of the first part, to have and to hold the same to the

said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever.

And also that the said parties of the first part and their heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest of, in or to the herein-granted premises by, from, under, or in trust for them, shall and will at all times hereinafter, upon the reasonable request and at the proper cost and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute, or cause to be made, done, and executed all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and effectually resting and confirming the premises hereby granted or intended so to be in and to the said party of the second part, his heirs and assigns forever, as by said party of the second part, his heirs and assigns, or his or their counsel, shall be reasonably advised, devised, or required.

257 In witness whereof the said parties of the first part to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) JAMES B. TAYLOR. [L. S.]
" LAURA S. TAYLOR. [L. S.]

Sealed and delivered in the presence of—
(Signed) CHARLES NETTLETON.
NATHANIEL GILL.

STATE OF NEW YORK,
City and County of New York, ss:

On the first day of December, A. D. one thousand eight hundred and sixty-five, before me personally came James B. Taylor and Laura S. Taylor, his wife, known to me to be the individuals described in and who executed the foregoing instrument of writing, who severally acknowledged to me that they had executed the same; and the said Laura S. Taylor, on a private examination by me apart from her husband, acknowledged that she executed the said instrument freely, and without any fear or compulsion of her said husband.

(Signed) CHARLES NETTLETON,
258 *Notary Public in and for the City, County, and State of New York.*

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles Nettleton, commissioner in said State, appointed by the governor of Texas to administer oaths and affirmations, and to take depositions, affidavits, and the acknowledgment and proof of deeds and other instruments to be used or recorded in the said State of Texas, duly commissioned and sworn, and dwelling in the city of New York, do hereby certify that James B. Taylor this day personally came before me and acknowledged that he signed, sealed, and delivered the foregoing instrument of writing, bearing date on the first day of December, A. D. one thousand eight hundred and sixty-five, as his voluntary act and deed, for the consideration, uses, and purposes therein expressed; and, at the same time and place, also personally appeared Laura S. Taylor, the wife of said James B. Taylor, having been examined by me privily and apart from her husband, and having the said deed fully ex-
259 plained to her, she, the said Laura S. Taylor, acknowledged the same to be her act and deed, and declared that she had willingly

signed, sealed, and delivered the same, and that she wished not to retract it; to certify which I hereto sign my name and affix my official seal this first day of December, A. D. 1865.

[SEAL.] (Signed) CHARLES NETTLETON,
Commissioner for Texas in New York.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this first day of December, A. D. one thousand eight hundred and sixty-five, before me, the undersigned Charles Nettleton, a commissioned resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the State of Louisiana, to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared James B. Taylor and Laura S. Taylor, his wife, to me known to be the individuals named in and who executed the foregoing deed, and severally acknowledged
260 to me that they did sign, seal, and deliver the same, as their free act and deed, on the day and year therein mentioned, and for the consideration, uses, and purposes therein expressed; and the said Laura S. Taylor being examined by me privily and apart from her husband, and having the said deed fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed and sealed the same, without any fear or compulsion of her husband, and does not wish to retract.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

[SEAL.] (Signed) CHARLES J. NETTLETON,
Commissioner for Louisiana in New York.

I, register of conveyances, certify that the within document was this day recorded in this office, in book 91, f. 222.

New Orleans, 2d May, 1866.

(Signed) PHI. GUESNON, *D'y R'r.*

261 *Final judgment.—From judgment docket.*

United States circuit court, fifth circuit and district of Louisiana, April term, 1871.

NEW ORLEANS, *Saturday, June 17th*, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

J. B. TAYLOR & AL. *vs.* L'S HUBERT. } No. 6259.

This cause being now submitted to the court by written consent of counsel, and a stipulation waiving trial by jury having been filed, the court, upon due consideration of the pleadings and the law, now orders, adjudges, and decrees that judgment be entered in favor of the defendants with costs.

Judgment rendered June 17th, 1871.

Judgment signed June 20th, 1871.

(Signed) E. H. DURELL, *Judge.*

262 *Agreement of counsel.—Filed June 20th, 1871.*

United States circuit court, District of Louisiana.

JAMES B. TAYLOR & AL.
vs.
LOUIS HUBERT—E. E. NORTON, ASSIGNEE IN warranty.

JAMES B. TAYLOR & AL.
vs.
W. H. ZIMMERMAN—E. E. NORTON, ASSIGNEE in warranty.

It is agreed by the undersigned, counsel in the above-entitled causes on writs of error to the United States Supreme Court, that said causes shall be consolidated, the same being similar, for the purpose of making but one transcript of the evidence to serve for both of said causes, and each of the same.

(Signed) WALLACE & HANDLIN,
Of Counsel.

(Signed) AUG. DEB. HUGHES,
" ALBERT VOORHIES, *Atty's.*

263 *Petition and order for writ of error.—Filed June 20th, 1871.*

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of P. B. Foulke, public administrator of the succession of James B. Taylor, deceased, and of John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor, all plaintiffs in the suit of James B. Taylor et al. vs. Louis Hubert, E. E. Norton, assignee in warranty, and numbered 6259 on the docket of this honorable court, respectfully shows: That, in said suit of J. B. Taylor et al. vs. Louis Hubert, E. E. Norton, assignee in warranty, there is manifest error in the final judgment rendered in said case, to the prejudice of plaintiffs. The said plaintiffs therefore pray for a writ of error to the Supreme Court of the United States, on giving bond in conformity to law, and that the
264 defendants be cited to answer the same, and for general relief.

(Signed) WALLACE & HANDLIN,
Att'ys for Pl'ffs.

A writ of error is allowed in this case, as prayed for, returnable to the Supreme Court of the United States the first Monday of December next, 1871, the petitioners giving bond in the sum of five hundred dollars, with security according to law.

June 20th, 1871.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed June 20th, 1871.

United States circuit court.

JAMES B. TAYLOR & AL.
vs.
LOUIS HUBERT—E. E. NORTON, ASSIGNEE. } No. 6259.

Know all men by these presents, that we, P. B. Foulke, administrator of James B. Taylor's estate, John E. Devlin, Martha J. Devlin, and

Laura S. Taylor, as principals, and E. M. Cazeres, and A. F.
265 Cochran, ag't, as sureties, are held and firmly bound unto Louis Hubert, E. E. Norton, assignee in bankruptcy of Harlow J. Phelps in warranty, in the full and just sum of five hundred dollars, to be paid to the said Louis Hubert, E. E. Norton, assignee in bankruptcy of Harlow J. Phelps in warranty, their certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 20th day of June, in the year of our Lord, one thousand eight hundred and seventy-one.

Whereas, lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein James B. Taylor, John E. Devlin, Laura S. Taylor, and M. J. Devlin were plaintiffs, and Louis Hubert, E. E. Norton, &c., were defendants, judgment was rendered against the said James B. Taylor et al., plaintiffs, and the said
266 P. B. Foulke, administrator of Jas. B. Taylor's estate, John E. Devlin, Laura S. Taylor, and Martha Josephine Devlin, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Louis Hubert, E. E. Norton, assignee in warranty, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the 1st Monday of December next.

Now, the condition of the above obligation is such that if the said P. B. Foulke, administrator, John E. Devlin, Martha J. Devlin, and Laura S. Taylor, shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) WALLACE & HANDLIN, [L. S.]
Att'ys for Pl'ffs in error.
" A. F. COCHRAN, *Ag't.* [L. S.]
" E. M. CAZERES, [L. S.]
" P. B. FOULKE, *Pub. Adm'r.* [L. S.]

267 United States circuit court, fifth circuit and district of Louisiana.

JAMES B. TAYLOR & AL.
vs.
W. H. ZIMMERMAN. } No. 6260.

Petition.—Filed July 15th, 1870.

To the honorable the judges of the United States circuit court for the fifth circuit and district of Louisiana:

The petition of James B. Taylor, John E. Devlin, Laura S. Taylor, and Martha Josephine Devlin, who are citizens of the State of New York, and reside there, respectfully represents: That W. H. Zimmerman, a citizen of the State of Louisiana, residing in New Orleans, is in possession of and claims the following described property in the parish of Orleans, State of Louisiana, within the jurisdiction of this honorable court, to wit: A certain lot of ground in square No. 60, bounded by Live Oak, Magazine, Sixth, and Washington streets, designated
268 by the No. 31, adjoining No. 32, and measuring thirty feet front on Live Oak street, by a depth of one hundred and fifty-eight

two inches between parallel lines, and estimated on the inventory of the succession of Elizabeth Clew, No. 15285, of the second district court of the parish of Orleans, at four hundred dollars, but now actually worth two thousand dollars. Plaintiffs represent that they are the owners of said property and entitled to the possession of the same, which said property formed a portion of the succession of Elizabeth Clew, who died intestate, all of which will fully appear from the mortuary proceedings in said succession in said second district court.

They further represent that the rents and profits of said lot and the house thereon are and have been well worth the sum of twenty dollars per month since the 19th March, 1859.

They allege amicable demand and refusal to comply therewith.

Wherefore plaintiffs pray for citation, and that, after due pro-
269 ceedings, they may have judgment in their favor against said W. H. Zimmerman, decreeing plaintiffs to be the owners of said property in the proportion of one undivided fourth each, and as such that they be placed in possession of said property. Plaintiffs further pray for judgment for rents and profits in their favor at the rate of twenty dollars per month from April 6th, 1866, until plaintiffs are finally placed in actual possession of said property, and that plaintiffs' rights be reserved against John F. Clew, or his succession, and the surety on his bond, to wit, Albin Rochereau, to claim the rents and profits of said property from the time the succession of said Elizabeth Clew was opened on the 19th March, 1859, up to the time these plaintiffs may be finally placed in possession of said property.

Petitioners pray for costs, and for general relief, as in duty bound, &c.

(Signed) WALLACE & HANDLIN,
Att'ys for Pl'ffs.

270 I accept service of citation and copy of petition.
July 15th, 1870.
(Signed) WILMER H. ZIMMERMAN.

Answer and call in warranty.—Filed July 15th, 1870.

No. 6260.

United States circuit court for the 5th circuit & dist. of L'a.

And now into court comes the defendant in the above-entitled suit and for answer denies all and singular the allegations of plaintiffs therein contained, except such as are hereinafter specially admitted.

He admits that he is in possession of said property sued for, but only as farmer or lessee under one E. E. Norton, assignee in bankruptcy, to whom he has paid some rents, and who claims to have charge of the property.

Wherefore defendant prays that he may be dismissed from this suit and from the payment of any costs therein, and that said E. E. Norton be called in to defend the same, and for general and equitable relief.

(Signed) WILMER H. ZIMMERMAN.

271 *Citation in warranty, issued July 15th, 1870.*

The President of the United States of America to the marshal of the district of Louisiana, greeting:

JAMES B. TAYLOR & AL. *vs.* W. H. ZIMMERMAN. } No. 6260.

You are hereby commanded to summon E. E. Norton to comply with the demand of the defendant, W. H. Zimmerman, a citizen of the State of Louisiana, contained in the answer and call in warranty, of which a copy of the petition accompanies this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit, and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans,
272 the place where the court is held. And that you make due return hereof on the first Monday of September, 1870.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 15th day of July, A. D. one thousand eight hundred and seventy, and of the Independence of the United States of America the 95th year.

(Signed) D. URBAN, *Clerk.*
By F. B. VINOT,
D'y Clerk.

Marshal's return of service.

Received July 19th, 1870, by the U. S. marshal, and on the 25th day same month and year, served copy of the within citation and accompanying answer and call in warranty and petition, on the within-named E. E. Norton, by leaving the same at his office in the custom-house building in this city, in the hands of E. D. Lebreton,
273 clerk in charge of said office, personally known to me; the said Norton being absent at the time of service.

New Orleans, July 25th, 1870.

(Signed) S. W. REED,
D'y U. S. Marshal.

Default against E. E. Norton, assignee, called in warranty.—Extract from the minutes of Tuesday, November 22, 1870.

J. B. TAYLOR & AL. *vs.* W. H. ZIMMERMAN. } No. 6260.

On motion of Wallace & Handlin, att'ys for plaintiffs, and on showing to the court that E. E. Norton, assignee, called in warranty, has failed to answer, although duly cited, ordered that judgment by default be entered against him.

Rule by warrantor.—Extract from the minutes of Friday, November 25th, 1870.

JAS. B. TAYLOR & AL.
vs.
274 W. H. ZIMMERMAN. } No. 6260.

On motion of Aug. De B. Hughes, attorney of E. E. Norton, assignee in bankruptcy of the estate of H. C. Symonds, and as such called in warranty by the defendant, it is ordered by the court that said plaintiffs show cause on Wednesday, November 30th, 1870, at 11 a. m., why the default taken on 22d instant should not be vacated and set aside, and why said E. E. Norton, assignee as aforesaid, shall not have twenty days within which to file his answer, exception, or other plea to said petition, and call in warranty on the grounds filed.

Grounds filed November 25th, 1870.

JAMES B. TAYLOR & ALS.
vs.
W. H. ZIMMERMAN. } No. 6260.

On motion of Augustus De B. Hughes, attorney of E. E. Norton, assignee in bankruptcy of the estate of H. C. Symonds, and as
275 such called in warranty by the defendant in the above-entitled cause, and on showing to the court that the petition and call in warranty were attempted to be served upon this appearer by leaving copies thereof with his clerk during this appearer's absence from the city; that the same have been mislaid and lost, and were never in fact delivered to the said Norton, nor were the same ever brought to his knowledge; and on further showing that, on November 22d, a default was entered in said suit against said Norton, and on showing that the facts which constitute his defense are wholly within the knowledge of said Symonds, bankrupt, and not of this appearer, and will require a careful examination into the title to certain real estate, it is ordered by the court that said plaintiffs do show cause on Wednesday, November 30th, 1870, why said default should not be vacated and set aside, and why said E. E. Norton, assignee as aforesaid, shall not have twenty days within which to file his answer, exception, or other plea, to said petition and call in warranty.

276 *Marshal's return.*

Received November 26, 1870, by the United States marshal, and on the 28th day same month and year, served a copy of the written rule on the plaintiffs herein, through Wallace & Handlin, their attorneys, by delivering the same to W. W. Handlin, one of said attorneys, in person.
New Orleans, November 28th, 1870.
(Signed) S. W. REED,
D'y U. S. Marshal.

Order.—Default set aside.—Extract from the minutes of November 30th, 1871.

J. B. TAYLOR
vs.
W. H. ZIMMERMAN. } No. 6260.

By written consent of counsel, it is ordered that the default entered on the 22d November, 1870, be set aside, and that E. E. Norton, warrantor, have 10 days from this day in which to file his plea, exception, or answer.

277 *Answer of warrantor.—Filed December 8th, 1870.*

United States circuit court for the fifth circuit and district of Louisiana.

JAMES B. TAYLOR & AL.
vs.
W. H. ZIMMERMAN, E. E. NORTON, ASSIGNEE, &c., called in warranty.

And now into this honorable court comes E. E. Norton, assignee in bankruptcy, called in warranty by the above-named defendant, and in answer to the petition of the plaintiffs filed herein, and the answer of said defendant denies each and every allegation in said answer or petition contained, except as may herein be specifically admitted. He admits that, on the 16th day of March, A. D. 1869, he was appointed additional assignee of the estate of H. C. Symonds, who had petitioned the honorable U. S. district court for the district of Louisiana to be discharged from his debts under and by virtue of the provisions of an act of Congress approved March 2d, 1867, and commonly called the bankrupt
278 act, and had made a surrender of his property as required by section 11 of said act; that, at a meeting of the creditors of said bankrupt, one J. Shore Symonds was elected assignee of said estate and has accepted said trust. He admits that he and his co-assignee have together rented said premises, in said petition described, at a stipulated rent of fifteen dollars per month, and that they have received and credited to the account of said estate two hundred and twenty-five dollars, that being the entire amount of rent received from and due by the tenant of said premises, under the contract of hiring thereof, from the month of February, A. D. 1869, to the 20th day of July, A. D. 1870, since which time the said defendant, W. H. Zimmerman, the present tenant thereof, has neglected and refused to pay the rent stipulated and reserved as aforesaid. And this appearer specially denies that said premises are, or within said term during which the rent has been collected as aforesaid have been, worth any larger sum. That he admits that the property in question was a part of the succession of Elizabeth Clew,
279 deceased, but he denies that the said Elizabeth died intestate, or that the plaintiffs herein are the owners of, or interested in, or entitled to, the possession of said property. And further answering, this appearer shows that said property was acquired bona fide by H. C. Symonds, by purchase from John F. Clew, legatee of Elizabeth Clew, deceased, by act passed before Selim Magner, notary public, on or about the day of April, A. D. 1866, and that said Symonds surrendered said property in bankruptcy, as aforesaid. And further answering, this appearer shows to this honorable court as follows, viz:

I. That the will of Elizabeth Clew was duly probated in the second

district court of New Orleans on the 25th day of January, A. D. 1861, which judgment is still in full force.

II. That, after the estate of the said Elizabeth Clew, deceased, had been duly and regularly administered upon and the debts paid, the universal legatee, John F. Clew, was, on the 29th day of March, A. D. 1866, regularly put in possession thereof, and specifically, of the
280 property now in controversy, by decree of the said probate court, which judgment is still in full force, being unreversed and unannulled.

III. That, meantime, said will, which had also been probated in the surrogate's court for the city and county of New York, was, in a suit (res inter alios acta,) reversed on the 5th day of December, A. D. 1864, by the supreme court of the State of New York for the county of New York; that, instead of an appeal being taken to the court of appeals the parties entered into a compromise, by which further litigation was waived, and the said John F. Clew, having received a certain compensation, did, by a certain private deed (which has never been recorded, and of which this appearer and his grantors had and have no knowledge whatever) give a release of all claim on his part to the succession of Elizabeth Clew, deceased.

Wherefore he prays that the demand of the plaintiffs be rejected, with costs, and he prays for all general and special relief.

(Signed) A. VOORHIES & AUG. DEB. HUGHES,
For E. E. NORTON.

281 *Jury waived and cause continued.—Extract from the minutes of January 12th, 1871.*

JAS. B. TAYLOR & AL.
vs.
W. H. ZIMMERMAN. } No. 6260.

By consent of counsel, now filed, the jury is waived and the cause continued for trial before the court on Tuesday, the 17th instant, at 11 a. m.

Note of evidence.—Filed January 17th, 1871.

NOTA.—To be found transcribed at page 17.

Hearing and submission.—Extract from the minutes of Tuesday, January 17th, 1871.

NOTA.—To be found transcribed at page 19.

Motion and order.—Extract from the minutes of Thursday, March 30th, 1871.

282 JAS. B. TAYLOR & AL.
vs.
W. H. ZIMMERMAN. } No. 6260.

On motion of P. B. Foulke, public administrator, and on suggesting the death of James B. Taylor, one of the plaintiffs herein, it is ordered by the court that P. B. Foulke, appointed administrator of the succession of James B. Taylor by the hon. the second district court of the parish of Orleans, be made party herein and authorised to prosecute this suit as the representative of said James B. Taylor, deceased.

Judgment from minutes.—Extract from the minutes of Monday, April 10th, 1871.

JAS. B. TAYLOR & AL. *vs.* W. H. ZIMMERMAN. } No. 6260.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that there be judgment recognizing the plaintiffs, James B. Taylor, John E. Devlin, Laura S. Taylor, and Martha Josephine Devlin, as the lawful owners, in the proportion of one undivided fourth
283 each, of the following described property, to wit:

A certain lot of ground in square No. 60, bounded by Live Oak, Magazine, Sixth, and Washington streets, designated by the No. 31, adjoining No. 32, and measuring thirty feet front on Live Oak street, by a depth of one hundred and fifty-eight feet two inches between parallel lines, and estimated, on the inventory of the succession of Elizabeth Clew, No. 15285 of the second district court of the parish of Orleans, at four hundred dollars, but now actually worth two thousand dollars.

It is further ordered and decreed that E. E. Norton, assignee in bankruptcy of Henry C. Symonds, baukrupt, called in warranty herein and holding possession of said property, do forthwith surrender the same to said plaintiffs.

It is further ordered that said assignee render an account showing the amount of rent received from the premises, and his expenses. And it is further ordered that the costs of suit be paid by the plaintiffs, unless it be proven that there are funds enough in the bankrupt's estate to satisfy the same.

284 *Rule for new trial.*

NOTA.—To be found transcribed at page 23.

Grounds for new trial.

NOTA.—To be found transcribed at page 23.

Marshal's return on foregoing rule and grounds.

NOTA.—To be found transcribed at page 24.

Submission of rule.

NOTA.—To be found transcribed at page 25.

Order.—New trial granted.—Extract from the minutes of Friday, June 16th, 1871.

JAS. B. TAYLOR & AL. *vs.* W. H. ZIMMERMAN. } No. 6260.

For reasons orally assigned by the court, it is ordered that the rule taken on the 12th April, 1871, be made absolute; that the judgment rendered on the 10th April, 1871, be set aside, and that a new trial
285 be granted in this case.

Waiver of jury.—Filed June 17th, 1871.

NOTA.—To be found transcribed at page 26.

Statement of facts.—Filed June 17th, 1671.

NOTA.—To be found transcribed at page 27.

Document C, referred to in the statement of facts.

NOTA.—To be found transcribed at page 38.

Document "D," referred to in the statement of facts..

NOTA.—To be found transcribed at page 98.

Document A, referred to in the statement of facts.

NOTA.—To be found transcribed at page 104.

Document A, referred to in the statement of facts.

NOTA.—To be found transcribed at page 193.

286 *Document G, referred to in the statement of facts.*

NOTA.—To be found transcribed at page 194.

Document A, referred to in the foregoing statement of facts.

NOTA.—To be found transcribed at page 196.

Petition in suit No. 9163, in U. S. district court, referred to in the statement of facts.

NOTA.—To be found transcribed at page 197.

Petition and citations in case No. 15285, referred to in the foregoing statement of facts.

NOTA.—To be found transcribed at page 204 to 216.

Document B, referred to in the statement of facts.

NOTA.—To be found transcribed at page 216.

Judgment referred to in the statement of facts.

NOTA.—To be found transcribed at page 240.

287 *Sale by Albert Day and his wife, Lydia E. Day, to James B. Taylor.*

Referred to in the statement of facts, and to be found transcribed at page 241.

Sale by Alfred R. Day to Jas. B. Taylor.

Referred to in the statement of facts, and to be found transcribed at page 248.

Sale by James B. Taylor and wife to John E. Devlin.

Referred to in the statement of facts, and to be found transcribed at page 253.

Final judgment.—From judgment docket.

United States circuit court, fifth circuit and district of Louisiana, April term, 1871.

NEW ORLEANS, *Saturday, June 17th*, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

288 JAMES B. TAYLOR & AL. *vs.* W. H. ZIMMERMAN. } No. 6260.

This cause being now submitted to the court by written consent of counsel, and a stipulation waiving a trial by jury having been filed, the court, upon due consideration of the pleadings, evidence, and the law, now orders, adjudges, and decrees that judgment be entered in favor of the defendants, with costs.

Judgment rendered June 17th, 1871; judgment signed June 20th, 1871.

(Signed) E. H. DURELL,
Judge.

Agreement consolidating cases.—Filed June 20th, 1871.

NOTA.—To be found transcribed at page 262.

Petition and order for writ of error.—Filed June 20, 1871.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

289 The petition of P. B. Foulke, public administrator of the succession of James B. Taylor, deceased, and of John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor, all plaintiffs in the suit of James B. Taylor et al. vs. W. H. Zimmerman, E. E. Norton, assignee in warranty, and No. 6260 of the docket of this honorable court, respectfully shows that, in said suit of J. B. Taylor et al. vs. W. H. Zimmerman, E. E. Norton, assignee in warranty, there is manifest error in the final judgment rendered in said case, to the prejudice of plaintiffs.

The said plaintiffs therefore pray for a writ of error to the Supreme Court of the United States, on giving bond in conformity to law, and that the defendants be cited to answer the same, and for general relief.

(Signed) WALLACE & HANDLIN,
Att'ys for Pl'ff's.

Order.

A writ of error is allowed in this case as prayed for, returnable to the Supreme Court of the United States the first Monday of December
290 next, 1871, the petitioners giving bond in the sum of five hundred dollars, with security according to law.

June 20th, 1871.

(Signed) E. H. DURELL,
Judge.

Bond for writ of error.—Filed June 20th, 1871.

United States circuit court.

JAMES B. TAYLOR & AL.
vs.
W. H. ZIMMERMAN, E. E. NORTON, ASSIGNEE, &C. } No. 6260.

Know all men by these presents, that we, P. B. Foulke, administrator of James B. Taylor's estate, John E. Devlin, Martha J. Devlin, and Laura S. Taylor as principals, and Em. Cazeres and A. F. Cochran, agent, as sureties, are held and firmly bound unto W. H. Zimmerman, E. E. Norton, assignee in bankruptcy in warranty, in the full and just sum of five hundred dollars to be paid to the said W. H. Zimmerman, E. E. Norton, assignee in bankruptcy in warranty, their certain attor-
291 ney, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this 20th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas, lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein James B. Taylor, John E. Devlin, Martha J. Devlin, and Laura S. Taylor, were plaintiffs, and W. H. Zimmerman & E. E. Norton, assignee, &c., were defendants, judgment was rendered against the said James B. Taylor & al., plaintiffs, and the said P. B. Foulke, adm'r, John E. Devlin, M. J. Devlin, and Laura S. Taylor, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. H. Zimmerman and E. E. Norton, assignee in warranty, citing and admonishing them
292 to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said P. B. Foulke, adm'r, John E. Devlin, Martha J. Devlin, and Laura S. Taylor, shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) WALLACE & HANDLIN. [L. S.]
Att'ys for Pl'ffs in Error.
" A. F. COCHRAN, *Ag't.* [L. S.]
" EM. CAZERES. [L. S.]
" P. B. FOULKE, *Pub. Adm'r.* [L. S.]

293 United States of America, circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE:

I, Francis A. Woolfley, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 292 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the consolidated cases of James B. Taylor & al. vs. Louis Hubert, E. E. Norton, assignee in warranty, and James B. Taylor & al. vs. W. H. Zimmerman, E. E. Norton, assignee in warranty, No. 6259 & 6260 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court at the city of New Orleans, this 4th day of August, A. D. 1871.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

[5-cent internal revenue stamp, cancelled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 4th day of August, A. D. 1871.

E. H. DURELL, *Judge.*

[5-cent internal revenue stamp, cancelled.]

294 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between P. B. Fouke, public administrator of the succession of James B. Taylor, deceased, and of John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor, plaintiffs in the suit entitled James B. Taylor et al. vs. W H. Zimmerman, E. E. Norton, assignee in warranty, No. 6260 of the docket of the said court, a manifest error hath happened, to the great damage of the said above-named plaintiffs, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said

Supreme Court of the United States, this 20th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.]

D. URBAN,
Clerk of the United States Circuit Court
For the District of Louisiana.

295 (Indorsed:) United States circuit court. No. 6260. P. B. Fouke, adm'r of succ'n of Jas. B. Taylor & others, pl'ffs in error, versus W. H. Zimmerman, E. E. Norton, assignee in warranty, def'ts in error. Writ of error. Filed June 20th, 1871. F. B. Vinot, d'y cl'k.

296 The United States of America, district of Louisiana.

The President of the United States to E. E. Norton, assignee in warranty, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein P. B. Fouke, public administrator of the succession of James B. Taylor, deceased, and John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said petition & writ mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 21 day of June, in the year of our Lord one thousand eight hundred and seventy-one.

E. H. DURELL, *Judge.*

297 On this 8th day of July, 1871, personally appeared before me the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation, as stated in his official return hereon.

S. W. REED.

Sworn & subscribed before me.

F. B. VINOT, *D'y Clk.*

(Indorsed:) United States circuit court. No. 6259. To E. E. Norton, assignee, P. B. Fouke, adm'r of succ'n of Jas. B. Taylor, pl'ffs in error, vs. Louis Hubert, E. E. Norton, assignee in warranty, def'ts in error. Citation.

Marshal's return.

Received June 21, 1870, by the U. S. Marshal, and on the 22d day of June, 1871, served a copy hereof on E. E. Norton, personally, at his office, 17 Exchange alley, in this city.

New Orleans, July 7th, 1871.

S. W. REED,
D'y U. S. Marshal.

298 The United States of America, district of Louisiana.

The President of the United States to Louis Hubert, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein P. B. Fouke, public administrator of the succession of James B. Taylor, deceased, & John E. Devlin, Martha Josephine Devlin, & Laura S. Taylor are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said petition & writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and seventy-one.

E. H. DURELL, *Judge.*

299 On this 8th day of July, 1871, personally appeared before me the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation, as stated in his official return hereon.

S. W. REED.

Sworn and subscribed before me.

F. B. VINOT, *D'y Clk.*

(Indorsed:) United States circuit court. No. 6259. To Louis Hubert, P. B. Fouke, adm'r of succ'n of Jas. B. Taylor & others, pl'ffs in error, vs. Louis Hubert, E. E. Norton, assignee in warranty, def'ts in error. Citation.

Marshal's return.

Received Jun' 21, 1870, by the U. S. Marshal, and on the 22d day of June, 1871, served a copy hereof on Louis Hubert, personally, at the corner of First & Magazine street in this city.

New Orleans, July 7th, 1871.

S. W. REED,
D'y U. S. Marshal.

300 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between P. B. Fouke, public administrator of the succession of James B. Taylor, deceased, and of John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor, plaintiffs in the suit entitled James B. Taylor et al. vs. Louis Hubert, E. E. Norton, assignee in warranty, No. 6259 of the docket of the said court, a manifest error hath happened, to the great damage of the said above-named plaintiffs, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of

the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 20th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] D. URBAN,
Clerk of the United States Circuit Court for the District of Louisiana.

301 (Indorsed:) United States circuit court. No. 6259. P. B. Fouke, adm'r of succ'n of Jas. B. Taylor & others, pl'ffs in error, versus Louis Hubert, E. E. Norton, assignee in warranty, def'ts in error. Writ of error. Filed June 20th, 1871. F. B. Vinot, d'y cl'k.

302 The United States of America, district of Louisiana.

The President of the United States to E. E. Norton, assignee in warranty greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein P. B. Fouke, public administrator of the succession of James B. Taylor, deceased, and John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said petition and writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and seventy-one.

E. H. DURELL,
Judge.

303 On this 8th day of July, 1871, personally appeared before the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation, as stated in his official return hereon.

S. W. REED.

Sworn & subscribed before me.

F. B. VINOT, *D'y Clk.*

(Indorsed:) United States circuit court. No. 6260. To E. E. Norton, assignee, P. B. Fouke, adm'r of succ'n of Jas. B. Taylor & others, pl'ffs in error, vs. W. H. Zimmerman, & E. E. Norton, assignee in warranty, def'ts in error. Citation.

Marshal's return.

Received Jun' 21, 1870, by the U. S. marshal, and on the 22d day of June, 1871, served a copy hereof on E. E. Norton, personally, at 17 Exchange ally, in this city. New Orleans, July 7th, 1871.

S. W. REED,
D'y U. S. Marshal.

304 The United States of America, district of Louisiana.

The President of the United States to W. H. Zimmerman, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein P. B. Fouke, public administrator of the succession of James B. Taylor, deceased, and John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said petition & writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and seventy-one.

E. H. DURELL,
Judge.

305 On this 8th day of July, 1871, personally appeared before me, the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation, as stated in his official return thereon.

S. W. REED.

Sworn and subscribed before me.

F. B. VINOT, *D'y Clk.*

(Indorsed:) United States circuit court. No. 6260. To W. H. Zimmerman. P. B. Fouke, adm'r of succ'n of Jas. B. Taylor & others, pl'ffs in error, vs. W. H. Zimmerman & E. E. Norton, assignee in warranty, def'ts in error. Citation.

Marshal's return.

Received Jun' 21, 1870, by the U. S. marshal, and on the 22d day of June, 1871, served a copy hereof on W. H. Zimmerman, personally, on Magazine, between 5 & 6th streets, in this city. New Orleans, July 7th, 1871.

S. W. REED,
D'y U. S. Marshal.

306 *Assignment of errors.*

Supreme Court of the United States, of December term, in the year of our Lord one thousand eight hundred and seventy-one.

P. B. FOUKE, ADMINISTRATOR OF THE SUCCESSION of James B. Taylor and others,
vs.
LOUIS HUBERT ET AL.

SAME
vs.
W. H. ZIMMERMAN ET AL.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at

the capitol in the city of Washington, come the said P. B. Fouke, adm'r, &c., and others, by A. P. Field and W. W. Handlin, their attorneys, and say that, in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The insufficiency of the facts found to support the judgments, in this, that it is nowhere shown that John F. Clew ever had any title, and consequently the judgments giving title to defendants, as the
307 vendees of John F. Clew, is erroneous.

2. Elizabeth Clew, deceased, being the common author, died intestate, as found by the jury; consequently the title to her property vested in her heirs, the plaintiffs, and the judgments in these cases against plaintiffs for the property claimed in these suits, which was a part of her estate, are erroneous in law.

3. While a litigation was pending in New York as to the validity of the will, of which there was full notice in the succession of Elizabeth Clew, opened in New Orleans, John F. Clew could convey no title to defendants as legatee under the will, (which was finally annulled,) and the judgments decreeing such conveyances to be valid are erroneous and contrary to law.

4. There was never any proof of the will in New Orleans, or probate, except upon the certified copy of the surrogate, which showed, as well as the pleadings, that an appeal was taken from the probate of New York, and the judgments are erroneous in holding that defendants, vendees of John F. Clew, are purchasers without notice, or that purchasers of real property are to be assimilated to innocent third holders of commercial paper without notice.

5. Even if defendants were innocent purchasers of real estate
308 without title, except in form only, under the law of Louisiana such apparent title could only be good after ten years' prescription, and the judgments are erroneous in sustaining such titles when they were attacked within the ten years; because no prescription could begin to run until 1866, up to which time J. F. Clew pretended to act as executor, in Louisiana, as an officer of the court, and did not pretend to hold in his own right, but in trust for others, viz: himself as legatee, or, the heirs-at-law in case the will should be declared to be a nullity.

6. The court erred in supposing that succession property, consisting of real estate, could be sold without notice to the heirs and an order of court showing the necessity for the sale, and specially directing the sale to be made by the sheriff, or an auctioneer designated in the order.

7. The quit-claim deed, or release, of John F. Clew as to the real estate alone cannot be considered as a compromise of the suit concerning the will, which related to both real and personal property, and it is not such a recognition of title in John F. Clew by the heirs as would estop them from disputing that he ever had any title; hence, it is erroneous to hold that the heirs claim under John F. Clew and not
309 as heirs of Elizabeth Clew, or that said release, or quit-claim, conferred any advantage on the defendants, the vendeees of John F. Clew, who are not shown to have acted upon inducements by plaintiffs, or to have known of its existence until it was registered, which took place long after their pretended purchase. In fact, the answer of Norton, warrantor, expressly alleges the ignorance of the vendees of John F. Clew of said deed of release or quit-claim to the real estate.

8. The petition of Mr. Attorney Stone, as an ejectment suit filed in the United States district court, which is a court of admiralty, was no judicial admission if that court had no jurisdiction ratione materiæ, and

the court could not properly construe the allegation that the heirs had paid John F. Clew $30,000 for his rights as a compromise, without, at the same time, admitting the whole of said petition, which expressly charged that John F. Clew never had any rights or title to the estate of Elizabeth Clew.

So that, neither under the will, which was revoked, nor under the release, by which he renounced what he never owned, could he convey any title in the realty to the defendants.

And the said A. P. Field and W. W. Handlin pray that the judgments aforesaid may be reversed, annulled, and altogether held for
310 nought, and that the said P. B. Fouke, administrator, and others, plaintiffs in error, may be restored to all things which they have lost by occasion of the said judgment.

A. P. FIELD,
W. W. HANDLIN,
Attorneys for Plaintiffs in Error.

(Indorsement on cover:) Louisiana C. C. U. S. No. 560. P. B. Fouke, adm'r of James B. Taylor, dec'd, and John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor, plaintiffs in error, vs. W. H. Zimmerman & E. E. Norton, assignee, &c. And No. 561. P. B. Fouke, adm'r of James B. Taylor, dec'd, and John E. Devlin, Martha Josephine Devlin, and Laura S. Taylor, plaintiffs in error, vs. Louis Hubert & E. E. Norton, assignee, &c. Filed 2d September, 1871.

U. S. CIRCUIT COURT.

FIFTH CIRCUIT, LOUISIANA.

JAMES B. TAYLOR, Et Al.

versus Nos. 6259, 6260.

LOUIS HUBERT.
E. E. NORTON, Assignee in Warranty.

SAME vs. ZIMMERMAN.
E. E. NORTON, Assignee in Warranty.

The facts of this case are substantially as follows:

Mrs. Elizabeth Cleu died in the year 1859. Her husband, John F. Cleu, then presented a written document, purporting to be the last will and testament of the deceased, to the Surrogate of the county of New York for probate. Transcript p. 38

In his petition he acknowledged the present plaintiffs to be the heirs at law, and had them duly cited. p. 13

About the same time, March 19, 1859, A. F. Cochran, by petition to the Second District Court of New Orleans, applied for the Curatorship of the succession of Elizabeth Cleu in Louisiana, and in his supplemental petition, filed April 13, 1859, sets forth that he is the agent and attorney in fact of the heirs at law, and that

a litigation was then pending as to the validity of said last will before the Probate Court of the county of New York, where the deceased had her domicil. f. f. 33 & 34

John F. Cleu opposed the application, which opposition was never tried.

The heirs at law contested the probate of the pretended will before the Surrogate of the county of New York, and on the 5th day of January, 1861, appealed from the decision of the court to the Supreme Court of New York. See Record, pages 19 and 20. f. 17

On the first Monday in February, 1861, the Supreme Court of New York reversed the order of the Surrogate appointing John F. Cleu executor in all things, including the probate, letters testamentary, etc., and remanded the case to be tried before a jury of the vicinage as to the validity of the will. See Record, pages 158, 159, 160. f. f. 26 & 27

On the 25th day of January, 1861, John F. Cleu presented a copy of the pretended last will (together with a certificate of the Surrogate showing that an appeal had been taken) to the Second District Court of New Orleans for probate. See Record, pages 15 to 20. f. 40

The document was admitted to probate without notice to the present plaintiffs, (heirs at law) or their agent, and without trying the opposition then pending.

An inventory was then ordered and taken in New Orleans, showing real estate to the value of $22,500, together with personal assets amounting to $3,203 55.

On the 19th of August, 1864, while the war was yet pending, John F. Cleu filed an account to be permitted

to pay the judgment of Samuel Broom's estate for $5,999 90. Record, page 51.

On the 8th day of September, 1864, John F. Clue disposed of any claim he might have to the real estate of the succession of Elizabeth Cleu to the heirs at law. See Release.

On the 29th day of March, 1866, John F. Cleu applied to the Second District Court of New Orleans for a discharge, and to be placed in possession of the estate in this city, and the order was granted *the same day, wholly ex parte*, by the fraudulent representations of said Cleu.

On or about the 6th day of April, 1866, John F. Cleu proceeded to sell the real estate belonging to said succession at private sale, for cash.

Soon after said Cleu departed for New York and died on the way or soon after his arrival there.

In the month of June, 1866, several actions were instituted by the heirs of Elizabeth Cleu, in the courts of New Orleans, for the recovery of this property, and to prevent the agent of John F. Cleu from selling other property.

On the 15th of November, 1866, the verdict of the jury in the Supreme Court of New York, on the issue of facts, was rendered, declaring that the *will was wholly revoked before her death*, and that she died INTESTATE, all of which was done contradictorily with Philomena Cleu, the widow and executrix of the last will of John F. Cleu, deceased, represented by eminent counsel.

On the 6th day of December, 1866, the Surrogate of the county of New York ordered that the judgment of the Supreme Court of New York of November 6, be the judgment of that court," and pursuant thereto it was made the judgment of said Surrogate's court.

On the 19th of May, 1870, the heirs at law, made application to the Second District Court of the Parish of Orleans to be recognized as such, and to be placed in possession of the succession of Elizabeth Cleu deceased, and that all former orders of said court be revoked and annulled as improvidently issued. The Public Administrator (appointed under Act 87 of 1870) and the attorney for the absent heirs of John F. Cleu opposing.

On the 29th day of June, 1870, judgment was rendered in the Second District Court of New Orleans, revoking and annulling all former orders therein given, and decreeing that the heirs at law should be recognized and placed in possession of the succession of Elizabeth Cleu, deceased, through their legally constituted agent and attorney in fact, and that she died intestate.

Subsequently the present petitory actions were brought to recover the property belonging to said succession of Elizabeth Cleu deceased.

The eight lots claimed from Hubert were inventoried at $6,200, in the succession of Elizabeth Cleu; and the lot claimed from Zimmerman, E. E. Norton warrantor, was inventoried in said succession at $800 00. All of which and other property was yielding rents.

AUTHORITIES FOR PLAINTIFFS.

John F. Cleu could convey no greater title than he himself had, and he was in bad faith. C. C. 2010.

A judgment duly authenticated from another State imports full faith here, in relation to the matters embraced. Hen. Dig., page 748, 13 No. 2.

The whole succession being *in litigation*, a sale of the property by J. F. Clue before it was decided could give no title, and the *purchaser cannot plead good faith* or *want of notice; no notice is required in such a case.*

C. C. Art. 2428.

"A vendee or mortgagee, though for a valuable consideration, and without *notice*, expressed or implied, of a pending litigation touching the property, is bound by the judgment against his vendor or mortgagor."

Hen. Dig. page 754, No. 11.

"Pending a revocatory action to subject property to plaintiff's claim, *no alienation*, can be made to his prejudice. The alienee is protected neither by his good faith nor want of notice."

Hen. Dig. page 1326, 12. 3 A. 249; 9 A. 257.

But *there was full notice* in the proceedings, and in the certificate of the Surrogate to the copy of the will, that there was an *appeal* in New York.

A title founded on a will falls if there was no will, and the law of *the domicil* rules.

C. C. Art. 1589, 1681–2.
7 La. 135; 5 N. S. 49; 3 A. 579.
Genevive and Maria Robert, f. w. c.
Same case (important) 17 La. 4.
do do 2 Rob. 427.

Succesion Property - how sold C.C. 2600
Patterson vs Litton, 23 A. page 274 -
not yet published, but a certified copy
is on file with the Clerk,

The pretended will was no will according to the law of Louisiana, being neither olographic, nuncupative nor mystic, and *ex parte* probate orders are not binding on those not parties to them.

C. P. Arts. 935, 939.
2 A. 724.

To prescribe with good faith under a title valid in form only, it is necessary to possess *as owner* (Cleu was Executor up to 1866) and for *ten years*.

C. C. 3399, 3404, 3409, 3453, 3455, 3476.
Ib. 3414, 3416, 3437, 495.

The *seizin vested* in the heirs at the death, and their title to the property in the succession of Elizabeth Cleu has never been divested.

Ware vs. Jones. 4 A. 570; 19 A. 428

This last case, lately decided by the Supreme Court of Louisiana, bears a strong resemblance to the present case, the action being petitory and the conduct of the executor being full of turpitude, and his sales of property and other acts being declared null and void.

"If the will is void by the law of the domicil it is void everywhere, though executed with all the formalities required by law of the place where the personal property is locally situated." Jarman on Wills, pages 3 and 4; Story's Comfl. Laws; S. 473; 2 Greenl., Ev. S. 668.

"When the ecclesiastical court has granted probate of an instrument eventually ascertained not to be testamentary, according to the law of the domicil, this proceeding does not regulate or effect the ultimate

destination of the property, which therefore the executor will be bound to distribute according to the law of the domicil." Jarman on Wills, page 5.

Note—"The same is true of real estate where the probate court has exclusive jurisdiction over wills of both real and personal estate." 8 Ohio, 239; 16 Mars.; 433; 8 N. Hamp. 124.

4 R. 42—As to the compliance with the legal forms, by Cleu, executor.

The above doctrines of the general law correspond with our own code on the subject of wills.

C. C. 1589—"But testaments made in foreign countries, or in other States and territories of the Union, shall take effect in this State, *if they be clothed with all the formalities prescribed for the validity* of wills *in the place where* they have been respectively made." Now the will of Elizabeth Cleu was not clothed with the necessary formality of the sanction of the probate by the appellate court. It could not have effect except conditionally.

C. C. 1682—"This order of execution shall be granted without any other form than that of registering the testament, *if it be established that the testament has been duly proved* before a competent judge of the place where it was received. In the contrary case, the testament cannot be carried into effect, *without its being first proved* before the judge of whom the execution is demanded."

The will of Elizabeth Cleu never was duly proved at New York, and it was not proved here at all. It

mentary executor, the only proper persons, and they were recognized, and John F. Cleu's recognition was annulled by the Probate Judge of New Orleans.

Acts of 1842 and 1837—By these acts foreign executors must qualify according to law here, and must administer according to the law of Louisiana. But they must be justified by the law of Louisiana, and they must be genuine and bona fide executors.

1 R., 263 ; 2 R., 438 ; 9 R., 438 ; 12 R., 306, 335.; 11 A. 185.; 12 A. 399.—These cases treat of both foreign and domestic successions. Foreign executors are allowed to qualify, but must administer according to the laws of this State. But how can these cases apply to the case of John F. Cleu ? Did he administer the estate of Elizabeth Cleu according to the law of Louisiana or any other law ?

14 A. 633. Atkinson vs. Rogers. This case is in plaintiffs' favor, for it is a case of a foreign heir suing for property here, and although the decision states that the succession here is "separate for the purpose of administration," etc., it does not contemplate that, "the decision of claims" here, is to be made without proper parties.

1 R. 403. Thomas vs. Bourgeat.

It is very true that an action for balance of account against the succession of John F. Cleu must be brought in the Probate Court, and plaintiffs have expressly reserved their right against him or his estate, and his surety for account ; but that does not prevent, as already shown, the heirs duly recognized, from bring-

ng a petitory action in this court for property forming part of the succession of Elizabeth Cleu.

5 La. 387 and 10 R. 193—These cases we consider favorable to plaintiffs.

17 La. p. 4 Genevieve Robert, f. w. c., vs. Gustave Allier—This case we strongly rely upon, and only desire the Court to thoroughly understand it. The probate made here of a will not duly proved in France was a nullity. The probate of Elizabeth Cleu's will not proved here, and based upon a judgment not final but pending on appeal and reversed in the appellate court within thirty days, could have no effect here. These *ex parte* orders have no effect against those not parties.

5 R. p. 9; 6 R. p. 508; 10 R. p. 18—The jurisdiction of the Probate Court, it is true, is exclusive for the purpose of recognizing the heirs and decree ing that they are entitled to be put in possession, however, after they are so recognized, they are not wholly confined to a worthless administrator or his estate, but may pursue the property of their ancestor against all the world, and have their action against whomsover they find in possession of the immovable to which they are entitled, and *that* before the courts of ordinary jurisdiction.

3 N. S. 601; 4 A. 490—These cases have no application to Elizabeth Cleu's succession. A succession remains open till it is "administered," and the executor cannot be discharged from his trust till he delivers the property over to those entitled to it.

John F. Cleu never was discharged *quoad* these heirs against whom he never proceeded contradictorily.

4 R. 42—A mandamus—shows that the order putting John F. Cleu in possession, not being had contradictorily, was a nullity.

7 R., 183—Shows that Elizabeth Cleu died intestate, the seizin of the estate vested absolutely in plaintiffs her heirs at law.

2 A., 870, Ingram vs. Moore.—In this case the putting in possession and discharge was contradictory between the executors and heirs, although the creditors were not notified by advertisement, but the proceedings were regular by the creditors, because they were not notified.

14 A., 645—This case does not seem to be applicable, being in relation to a surety of a commercial partner.

12 A., 717—Rachal's succession can only show that if J. F. Cleu had any authority as executor, and if the tableau filed to pay the single creditor for a small amount had any effect whatever, it could certainly have no effect relative to the real estate still unadministered. J. F. Cleu filed an account in 1864, which was probably advertised, to pay the judgment of Broom for $4,999 90; but two years afterwards, at the time of the pretended discharge, there was no publication in the papers and no necessity for a sale. There was no application for sale to the Probate Judge, and no order to sell granted. He held as an officer of the court in trust for another.

Plaintiffs allege: "That they are the owners of said property and entitled to the possession of the same, which said property formed part of the succession of Elizabeth Cleu, who died intestate, all of which will fully appear from the mortuary proceedings in said Second District Court;" and they alleged in said proceedings that said John F. Cleu had improperly caused himself to be placed in possession, etc.

First: Said mortuary proceedings show plaintiffs to be the legal heirs of Elizabeth Cleu deceased, and that she died intestate.

Second. The inventory of the succession shows that the property claimed belonged to her succession, and said proceedings show that the title to said property has never been legally divested.

We, therefore, submit that plaintiffs' case is made out; that the seizin of said property vested in plaintiffs immediately on the death of said Elizabeth Cleu; and that they are entitled to judgment in their favor as prayed for in their petition.

Defendants' counsel ingeniously contends that the release of John F. Cleu to plaintiffs in 1864 of his rights to the real estate for one dollar, is the source from which plaintiffs derive their title, and that as that was not recorded here until May 2, 1866, some few days after their purchase, that they have the oldest title. That instrument speaks for itself. It shows that John F. Cleu knew that he had no title to the real estate of the succession. But if he had a title, such consideration is not allowed to vest any interest in this State.

C. C. 2439—"The price ought not to be out of all proportion with the value of the thing; for instance, the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised."

The release shows, notwithstanding, that John F. Cleu covenanted and agreed not to claim the property now claimed; that he acknowledged petitioners to be the "heirs at law" of Elizabeth Cleu; that he acted in bad faith and fraudulently, in coming to New Orleans and selling the property as his own, after he had thrown them off their guard. How could they know or suppose that he would do such an unparalleled act of baseness? We challenge our opponents to show one case where an executor has ever sold out an estate at private sale in this manner.

But counsel say there was a compromise for $30,000. There is no proof of this. In the suit of Laura Taylor, et al. vs. E. E. Norton, et al., in the U. S. District Court, which we discontinued, December 1, 1870, "without prejudice to any of plaintiffs' rights," there is found the fellowing allegation:

"And your petitioners further represent that, *after* said will was annulled on the 8th day of September, 1864, with a view to affording him some compensation *for the loss* of his bequests, they paid to John F. Cleu the sum of thirty thousand dollars in cash, and that he executed to them a *release* of any claim he might have to said succession, a copy of which will be produced in due time, *but your petitioners aver that he had no claim whatever to said succession.*"

This defendants' counsel attempts to construe into a judicial admission favorable to his client, the Insurance Company, (the mortgagee,) though we confess, that taking it altogether, we cannot see what he is to gain by it.

1st. If the District Court had no jurisdiction over a petitory action; it was not a judicial admission.

2d. Then the allegation says that the will was annulled *before* all this occurred. The order of probate was also annulled February, 1861.

However, he cannot take one allegation without taking all, and the following also occur:

"That Elizabeth Cleu died in 1859, in the city of New York, leaving a large real and *personal* estate, situated in the cities of New York and New Orleans;" * * * "that your petitioners and others took an appeal from the Surrogate admitting said will to probate to a court of competent jurisdiction, to-wit: the Supreme Court of New York, and the probate of said will was duly set aside and annulled, and has never since been probated, or made valid in any manner whatever."

"That the said John F. Cleu, upon the 25th day of January, 1861, by falsely and fraudulently representing to the Honorable the Second District Court of the city of New Orleans that the said will had been duly probated in the city of New York, obtained an order to approve, register and execute said will WITHOUT ANY NOTICE TO YOUR PETITIONERS thereof, and by false and fraudulent representations, and by other ill practices,

without notice to your petitioners, did, on the first of March, 1866, obtain the judgment of the Honorable the Second District Court of New Orleans, declaring him to be the universal legatee of his deceased wife, said Mrs. Elizabeth Cleu, and that as such he be put in possession of said estates in the city of New Orleans, all of which fraudulent acts of said John F. Cleu came to the knowledge of your petitioners within the last year," etc., etc.; * * * "that it is and was the property of your petititioneas."

The undersigned counsel for plaintiffs, hoping that that they have rendered the cause clear, respectfully submit the same.

WALLACE & HANDLIN,
of Counsel.

U. S. SUPREME COURT.

DECEMBER TERM, 1871.

PRINTED ARGUMENT AND BRIEF.

The Judge seemed to lay great stress upon the allegation (the only evidence) in the foregoing petition of Mr. Stone, that plaintiffs in error paid John F. Clue $30,000 for his pretended rights, in 1864; but he disregarded altogether the other allegations in the petition, that the will was annulled Sept. 8, 1864, that J. F. Clue was guilty of fraud, and that he never had any title whatever. The whole of the petition should have been taken together. "The law loves not fractions of constructions."

The judgment of Louis Duvigneau, Probate Judge of New Orleans, in favor of the heirs, *ought to have some weight.* The fact that Judge E. H. Durell, Circuit Judge, after long advisement, gave judgment herein, first in their favor, is not to be lost sight of. Then, that he should afterwards grant a new trial, and on the *same* evidence give a contrary judgment is also to be considered.

Besides the authorities herein mentioned, we will cite Article 23 of our Code of Practice, which declares, in terms, that "no one can transfer a better title to another than that which he himself had."

The heirs have a double claim, but the second does not exclude the first. First, they claim as heirs at law of Elizabeth Cleu. Second, they claim by the release in their favor *to the real estate* by John F. Cleu. And this may be by our law, Code of Practice, 151. "If the plaintiff has several causes of action tending to the same conclusion, * * * as if he claim from another both by inheritance and by purchase."

But defendants' counsel seem to have forgotten that we claim by inheritance; and they combat our claim under the deed for one dollar from John F. Cleu, and say they have the oldest title!

They rely on the case of Taylor vs. Huey, 11 A. 614, which is not in point, because the two parties claim from the same author. Besides the *possession* of John F. Clue was fiduciary.

Again, they cite (13th Annual, p. 362) the case of Knox. But it was different from the case at bar. By the laws of Mississippi, the property under the will of Prince, *vested* in the *husband* of Mrs. Knox; but by the laws of New York, the property of Mrs. Clue *did not* vest in her husband, but in her heirs. Therefore the claim by inheritance was excluded in the case of Mrs. Knox's case.

The case of Armorer vs. Case, (9 Annual 242,) can not avail defendants, because the parties were all privies and there was no allegation of fraud.

The first, and it seems the main objection to be disposed of, is the estoppel urged by defendants. John

F. Cleu's quit-claim deed or release was not recorded until.....1866, which was the first notice defendants had of it, and they had already purchased from Jonh F. Cleu, so that so far from having *acted* upon any admission by plaintiffs in error, that John F. Cleu ever had even any claim to the property; defendants were not privies to the quit-claim deed derivitively or in any other way, which could estop plaintiffs in error from showing the true facts of the case. On the contrary, the facts show that defendants acted upon no representations of plaintiffs whatever, except from the pleadings and proceedings in the Probate Court of New Orleans, which certainly showed that John F. Cleu's pretensions were contested in New York. Besides, the answer of Norton *alleges* ignorance of said quit claim deed on the part of defendants in error.

In the case of Webb vs. Deeson, 11 Ann. Reports, page 84, the reason of this rule of estoppel, where there has been an admission of *absolute* title, upon which *others have acted*, is clearly shown. But to prevent the party making the admission from afterwards showing the truth, it is of the essence of the rule that others shall have acted upon the admission and been deceived and led into error.

1. Greenleaf on Ev. Sec. 208.

So that this release being a mere private arrangement between the heirs and John F. Cleu, never *known to* or *acted upon*, by defendants, cannot operate as a bar in law or good conscience, to prevent

plaintiffs from showing that the true title was in ElizabethCleu, the common author, at her death and vested in plaintiffs as her heirs at law.

The registry of the release by plaintiffs' counsel or other agent . in 1866, after defendants' pretended purchase, was a mere harmless act, and was probably intended to show the frauds of John F. Clue. It deceived no one. Nor is the admission of the counsel in his bill (see) in the Admiralty Court, if there could be any *judicial* admission in such a case, of much force. Greenleaf (on Ev. sec. 212) says, "So, of a bill in chancery which is evidence against the plaintiff of the admissions it contains, though very feeble evidence, so far as it may be taken as the suggestion of counsel."

It is at best but surmise to contend that said release and said petition can be construed into a compromise of the suit in New York relative to the validity of the will, which was a will both of real and *personal* estate. Such a surmise cannot certainly impugn the fact in the record of that suit, that Elizabeth Cleu died intestate and that her will in favor of John F. Cleu had been revoked.

In answer to the seventh and last position assumed in defendant's brief, (which we did not see before it was filed,) we reply that *the pleadings* show that both parties have the same author, and claim from the same

source, and it is not disputed that there was title in Elizabeth Cleu as set forth in the inventory, under which *both* claim.

As to the probate proceedings, the first thing for the heirs to do was to be *recognized.* The succession papers showed that J. F. Cleu was put into possession; and the heirs of Elizabeth Cleu were not bound to know that he had sold the property at private sale, which *was not shown by the proceedings.*

They naturally supposed that he was in possession still, but as he was dead, they citied his representatives. P. B. Foulke, *by law*, was not only the representative of John F. Cleu's succession, and of *all* vacant successions, *but also* of Elizabeth Cleu's succession, so that the citation was proper and legal.

After being recognized, they discovered that Hubert and others claimed some of the property and were in possession; then under the Article of the Code of Practice, petitory actions were brought for the property, as belonging to the succession of Elizabeth Cleu, and consequently to her legal heirs, as having never been legally alienated.

over

ERRORS.

1. The insufficiency of the facts found to support the judgement, in this, that it is no where shown that John F. Cleu ever had any title, and consequently the judgment giving title to defendants as the vendees of John F. Clue is erroneous.

2. Elizabeth Cleu deceased, being the common author, died intestate, as found by the Jury; consequently, the title to her property vested in her heirs, the plaintiffs, and the judgments in these cases against plaintiffs for the property claimed in these suits, which was a part of her estate, are erroneous in law.

3. While a litigation was going on in New York as to the validity of the will, of which there was full notice in the succession of Elizabeth Cleu, opened in New Orleans, John F. Clue could convey no title to defendants as legatee under the will, (which was finally annulled,) and the judgments decreeing such conveyances to be valid, are erroneous and contrary to law.

4. There was never any proof of the will in New Orleans, or probate, except upon the certified copy of the Surrogate, which showed, as well as the pleadings, that an appeal was taken from the probate at New York, and the judgments are erroneous, in holding that the defendants, vendees of John F. Cleu, are purchasers without notice, or that purchasers of real pro-

perty are to be assimilated to innocent third holders of commercial paper without notice.

5. Even if defendants were innocent purchasers of real estate without title, except in form only, under the law of Louisiana, such apparent title could only be good after ten years prescription, and the judgments are erroneous in sustaining such titles when they were attacked within the ten years, because no prescription could begin to run until 1866, up to which time John F. Cleu pretended to act as Executor, in Louisiana, as an officer of the court, and did not pretend to hold in his own right, but in trust for others, viz: himself as legatee, or the heirs at law in case the will should be declared to be a nullity.

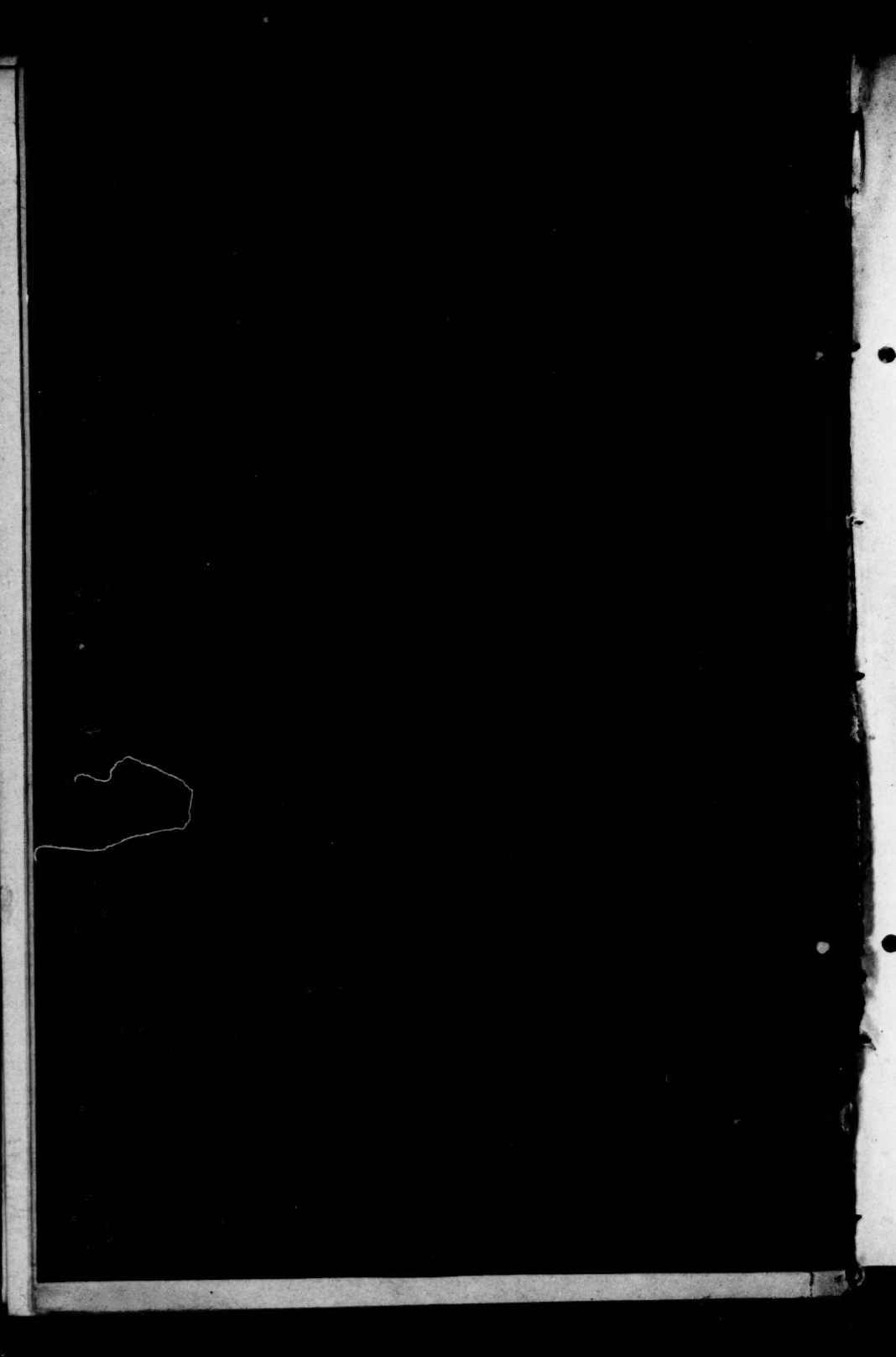
6. The court erred in supposing that succession property, consisting of real estate, could be sold without notice to the heirs and an order of court showing the necessity for the sale, and specially directing the sale to be made by the Sheriff or an auctioneer designated in the order.

7. The quit claim deed or release of John F. Cleu as to the real estate alone, cannot be considered as a compromise of the suit concerning the will, which related to both real and *personal* property, and it is not such a recognition of title in John F. Cleu by the heirs, as would estop them from disputing that he ever had any title; hence, it is erroneous to hold that the heirs claim under John F. Clue, and not as heirs of Elizabeth Cleu, or that said release or quit claim conferred any advantage on the defendants,

the vendees of John F. Cleu, who are not shown to have acted upon inducements by plaintiffs, or to have known of its existence until it was registered, which took place long after their pretended purchase.

8. The petition of Mr. Stone, as an ejectment suit, brought in the U. S. District Court, which is a court of Admiralty, was no judicial admission, if that court had no jurisdiction *ratione materiæ*, and the court could not properly construe the allegation that the heirs had paid John F. Clue $30,000 for his rights, as a compromise, without at the same time admitting *the whole* of said petition, which expressly charged, that John F. Clue never had any rights or title to the estate of Elizabeth Cleu, and that the will was null. So that neither under the will, which was revoked, nor under the release, by which he renounced what he never owned, could he convey any title in the realty to the defendants.

W. W. Hendley
of Counsel



U. S. Supreme Court.

No. 560.

J. B. TAYLOR & als. vs. HUBERT & als. E. E. NORTON, Assignee. — SAME vs. ZIMMERMANN & als., E. E. NORTON, Assignee.

Brief on behalf of Defendants.

The plaintiffs in error argue their whole case on false premises. They lose sight of the fact that Mrs. Elizabeth Clew, their deceased ancestor, left a New York Estate and a Louisiana Estate; and, failing to discriminate between the two as distinct substantial estates, they erroneously conclude that the mortuaria of the Estate of the domicil control, absolutely and *a proprio vigore*, the mortuaria of the other Estate, without reference to the fact that the latter proceedings were predicated upon real estate here under lawful administration.

The Record besides reveals an important fact: that the New York judgment, declaring the will of Mrs. E. Clew to have been revoked, was rendered long after the matter had been settled by compromise between

the present plaintiffs and John F. Clew, the legatee and husband of the deceased. (See Document N. at page 63 No. 196 of the Record.) The deed, thus recorded on 2d May 1866 in the Alienation Office at New Orleans, was a compromise as to all the real estate left by Elizabeth Clew deceased;—and, as a consideration, the sum of $30,000 was paid over to the legatee John F. Clew. (See statement of facts page 11 No. 3.)

Now as to the facts of the case, premising that the printed Record is incorrect as to certain dates; but other parts of the Record will enable the Court to ascertain the mistakes.

Elizabeth Clew died in the State of New York in 1859. Her will was duly probated in the Surrogate Court; but the Plaintiffs appealed to the State Circuit Court, averring that the testatrix had, in her lifetime, revoked this will.

In the meantime A. F. Cochran, special agent of Plaintiffs, had applied in the Second District Court of New Orleans to be appointed Curator of the Louisiana succession, averring that she had died intestate, and had left considerable real estate in New Orleans. Oppositions were filed by Demarest, claiming to be appointed himself curator; and also by John F. Clew, the husband of the deceased, who alleged that his deceased wife had left a will constituting him the universal legatee ond executor of her succession, and *that he was entitled to the executorship.*

Subsequently, upon the production of the will probated in the Surrogate Court of New York, the Second District Court, considering that instrument duly authenticated, ordered its probate and recognized

John F. Clew as executor of the Louisiana estate of Mrs. Elizabeth Clew dec'd. Act 1842 p. 300 Sec. 1, 3—C. P. Art. 930; Act 1855, p. 398.

C.C. art. 1688 (1631):—"Testaments made in foreign countries and other States of the Union, cannot be carried into effect on property in this State, without being registered in the Court, within the jurisdiction of which the property is situated, and the execution thereof ordered by the Judge."

C. C. art. 1689 (1682):—"This order of execution shall be granted without any other form than that of registering the testament, if it be established that the testament has been duly proved before a competent Judge of the place where it was received. In the contrary case, the testament cannot be carried into effect, without its being first proved before the Judge of whom the execution is demanded." 12 A. 399, succession of Davis;—13 La. 221 p. State ex rel. vs. Judge etc.; C. C. art. (1644) 1637;—17 La. R. 486.

As the presumptive or legal heirs of the deceased were non-residents, there was no necessity to give them notice of the motion to probate the will. C. P. Art. 935 is explicit in this respect.

The will of Mrs. Elizabeth Clew dec'd., probated in the Surrogate Court of New York, was, therefore, duly made executory in the Second District Court of New Orleans. No objections were raised by any one; and A. F. Cochran, the special attorney of the Plaintiffs, acquiesced in the decree of the Second District Court by allowing John F. Clew to proceed through an unbroken administration for a period of several years, up to his final discharge as executor, and his being placed in possession of the estate as universal legatee.

(From the year 1861 up to 29th March 1866.)

The will of Mrs. Clew having been duly probated in the year 1861, the executor John F. Clew having regularly administered upon the estate and obtained, on 29th March 1866, his discharge upon the homologation of a final tableau, there being no proceeding in the Second District Court of New Orleans to contest the validity of the will of Mrs. E. Clew,—the executor being himself the universal legatee, — what could the Court do but place this executor and legatee in possession, upon the formal application on file in the Record?

It is only when the executor and the heir are different persons, that the Code requires the proceedings to be contradictory. C. P. 1000, 1009.—C. C. art. 1193 (1181). But when they are one and the same person, to require contradictory proceedings would involve an absurdity. The will being duly probated and no one attacking its validity, there was no heir but the executor in his capacity of universal legatee. The Plaintiffs themselves were not heirs with this probated and executed will staring them in the face. 4. R. 42; 2. A. 870; 7. R. 183.

The judgment placing John F. Clew in possession was recorded, *March 29th* 1866, in the office of Recorder of Alienations in New Orleans; and on the *6th of April* 1866 John F. Clew sold to H. J. Phelps and J. Simonds, who, *on the 9th of the same month*, had their deeds of sale duly recorded.

Subsequently (*2d May*, 1866) the plaintiffs recorded a deed purporting to be a transfer from J. F. Clew to them of all his rights to the real estate of the succession of Elisabeth Clew. This brings us back to the

proceedings in the New York Courts. And here we reiterate our objections to the admissibility and to the effect of the Records of the Surrogate and Circuit Court of New York, to wit:

1. These records are *res inter alios acta* as these defendants were not parties thereto:—

2. The succession of Elisabeth Clew in the Courts of New York, is distinct from the suc'n of Elisabeth Clew in the Louisiana Courts; and the proceedings had in the former Courts do not control the proceedings in the latter. C. C. Art. 1644 (1637), 1688 (1681); —Act 1842, p. 300;— 1 R. R. 263, suc'n Wedderburn; —2 R, R. 438, suc'n May;—9 R. R. 438; suc'n Packwood,—12 R. R. 334, suc'n Packwood;—12 A. R. 399, suc'n Davis;—14 A. R. 633, Atkinson vs Rogers; —11 A. R. 185, Bone vs Sparrow. In Packwood's suc'n, 12 R. R. 363, the Court said: "What estate she may have left elsewhere, and what effect *the same will* may have as to her property situated elsewhere, it does not concern us to inquire. The principal question with us is what constituted *the estate of Alice Packwood in Louisiana*, at the time of her decease? Our own laws are to determine what constitutes her succession here and that alone is to be administered by her executor. Her suc n may be, as has been contended, an *entire thing;* but that is not inconsistent with the principle "that different parts of it, *situated in different States*, may be administered separately; and nothing can be more manifest than that Packwood, acting here as executor, cannot be compelled to account for anything, which the heirs of his wife may allege, formed a part of the estate not situated here."

In Atkinson vs. Rogers, 14 A. R. 634: "when a person dies, leaving property in two or more States or Countries, his property in each State is considered as *a separate succession* for the purposes of administration, the payment of debts, and the decisions of the claims of the parties asserting title thereto ; *and when it consist of immovables or real estate, it may be considered as a separate estate for the purpose of inheritance.*"

The mortuaria in the New York Courts cannot affect real estate of the succession situated within the limits of the State of Louisiana, and under the administration of the Courts of Louisiana. The heirs might recover against the legatee, in the former courts, the estate situated in New York, but not that which was under administration in the State of Louisiana ; and still less what had been previously acquired from the legatee by third persons in good faith.

The Surrogate Court had maintained the validity of the will of Mrs. E. Clew ; and the heirs at law had appealed to the Circuit Court. During the pendency of that appeal, (8th sept. 1864) for the sum of thirty thousand dollars paid to him, John F. Clew, transferred to the plaintiffs all his rights, under the will, to all the real estate in New York and Louisiana, *and thereby put an end to the New York litigation in so far as the real estate was concerned.* In other words the parties made a compromise. C. C. Arts 3071 (3075) (3038-3040).

The circuit court, in September 1866, reversed the judgment of the surrogate court, on the ground that the will in question had been revoked by the testatrix during her lifetime ; and this decree was afterwards registered in the surrogate court. And here it must

be borne in mind that, before the rendition of this judgment, the deed of September 8th 1864 from John F. Clew to the plaintiffs in error, had been duly recorded in the office of conveyances of New Orleans, to-wit: on 2d May 1866!

The Plaintiffs make their next appearence in this State in their suit vs. E. E. Norton. assignee, (Nos 9,163, 9,551), whom they sued in two petitory actions. Pending these suits they attempted a flank movement by means of a series of *ex parte* proceedings in the Second District Court of New Orleans, for the purpose of rectifying, what they considered, the irregular proceedings of John F. Clew deceased Executor. And after they had, as they thought, accomplished their purpose they discontinued their suits in the Federal District Court against E. E. Norton assignee; and instituted, in the Circuit Court, similar suits against two tenants, to whom the assignee had leased the premises *pendente lite*.

Their proceedings in the Second District Court were intended to set aside all the mortuary proceedings, which had been heretofore carried on in the Estate of Eliz. Clew deceased,—and to have themselves recognized as heirs, and, as such, placed in possession. For that purpose it was deemed advantageous to evoke an unconscious adversary, with whom the litigation might be carried on.

The Code of Practice Art. 1000,1009 and C. C. Art. 1193 (1181) require of heirs to proceed against the curator or executor of an estate, in order to have themselves recognized as heirs and placed in possession.

But, in the case at bar, the executor had been dis-

charged, and, as universal legatee, had been placed in possession;—and, after disposing of the devised property by sale at auction, had departed this life.

There was, therefore, no living executor in the Estate of Eliz. Clew dec'd; and we imagine that, having died, John F. Clew had certainly ceased to be executor. The Plaintiffs, however, procured the opening of a Louisiana succession of John F. Clew deceased, whose will had been probated at the place of his late domicil, Philadelphia; the property alleged to belong to his deceased wife, was inventoried as his own with a stipulation or reservation that this was without prejudice to the rights of her legal heirs.—A sort of benefit of inventory scarcely known to the law!

The Plaintiffs also provoked the appointment of an Attorney of absent heirs of J. F. Clew, whose succession was in course of administration in another State C. C. Art. 1200 (1204) *et seq.*

Where was the succession of Eliz. Clew dec'd in all these proceedings?—Her succession was lost sight of completely: it was not represented at all; for it does not need argument to show that the executor of a dec ased executor administers only on the individual Estate of the deceased executor, but does not succeed him in the executorship. A, the executor of B,—dies;—C is appointed executor of A; that appointement does not make him executor of B, to whom a distinct executor must be appointed.

It was incumbent on the Plaintiffs to have proceeded at least against the executor of Mrs. Eliz. Clew's Estate,—certainly not against the Administrator of John F. Clew, whose functions had terminated by

death.

The proceedings carried on by the Plaintiffs in the Second District Court were not had contradictorily with proper parties, to wit: the curator or executor of the Estate of Elisabeth Clew deceased, (C. P. Art. 610 1000;—C. C. Art. 1181), and the legatee's transferees.

All the proceedings had against the succession of John F. Clew could by no legal possibility, culminate in setting aside the mortuary proceedings had in the Estate of Eliz. Clew deceased; the decree to that effect is *brutum fulmen*. And, as a puzzle, we suggest a critical examination of the reasons given for the issuance of that decree.

Having thus argued the main facts of the case, we contend:

1 That the purchasers acquired in good faith from the universal legatee, who had regularly administered as executor of the suc'n of Elizabeth Clew, dec'd, and, who, after his final discharge as such, had been placed in possession;—that this constitutes a valid title unto them; and that the subsequent proceedings had, in that court, at plaintiff's instance, can have no retroactive effect upon the validity of such titles,—more especially as these defendants were not parties to these late proceedings. 11 L. R., 9;—3 R. R., 119;—18 A. R.. 408.

II. That by virtue of said compromise the matter of the validity of the Will, as *affecting the real Estate*, had ceased to be a matter of litigation; and that, *to that extent*, the Will was and is now in full force in the Second District Court of Louisiana. C. C. Art. 3071 (3038). Such compromise or transaction has the force of *res judicata*. C. C. Art. 3078 (3045).

III. That by the compromise of 1864 the Plaintiffs became the successors by particular title of John F. Clew, under whom def'ts hold by virtue of sales with prior registry ; and they are estopped from questioning Defendants' titles. C. C. Art. 2235-2239 (2232-2235).

When the compromise was made in New York in 1864, the will of Mrs. Elizabeth Clew had been probated in the Surrogate Court after contradictory proceedings between the legatee and the presumptive heirs. This deed of compromise embraced the property now in litigation; and by this deed the plaintiffs actually became the successors of John F. Clew by particular title; and as their transfer was recorded only after the sales from J. F. Clew to Phelps and to Simond had been duly recorded, the deed of compromise has for date, so far as these persons are concerned, the date of registry of this deed in the Office of Alienations of the parish of Orleans. As transferrees of J. F. Clew for the consideration of $30,000, the plaintiffs are estopped from questioning the previously recorded titles of the defendants, who also hold from John F. Clew. And the plaintiffs are further estopped from questioning the validity of the will, *as regards the real estate*, since the deed of compromise, *to that extent*, is based upon the validity of the will. The deed of compromise put an end to the litigation *as to the real estate*, and forms res judicata.

IV. That in no event can the ligitation in the mortuaria of a succession in another State, control the mortuaria of the Louisiana Estate, as both of said successions are distinct from, and independent of each other.

The executor of Mrs. E. Clew having been discharged, and the universal legatee having been placed in possession, it was incumbent on plaintiffs to ask in the Louisiana Courts, contradictorily with proper parties, the nullity of the will itself, and of the decree placing the universal legatee in possession.

The will of Elizabeth Clew deceased having been probated in the Second District Court of New Orleans, and, after a full administration by, and discharge of the executor, third persons having acquired in good faith title from the universal legatee under the will, *it is incumbent on the Plaintiffs to attack the validity of this will by a direct action in the Courts of this State.* Succession of Enbanks, 9 A. R. 148; C. P. Arts. 604, 942, 943. It is not sufficient to set aside the probate of the will; but the will itself must be assailed. It is, as far the Louisiana Estate is concerned, the province of our Courts to determine whether there has been a revocation of that will by the testatrix. Otherwise the title to the real estate situated in this State would be subject to the control of foreign Court, in a suit between parties, one of whom, might have already parted with his interests in the premises.

V. John F. Clew, not being a resident of New Orleans, having died abroad, and having no property in New Orleans, the Second District Court had no jurisdiction whatever to open his succession and compel the public administrator to appear as a *figurant* in these proceedings. Johnson vs. Brown, 3 N. S. 601;—5 R. R. 9; 6 R. R. 508;—10 R. R. 18.

VI. It was further incumbent on the plaintiffs, since the executor had actually administered under the orders of the Second District Court, to have themselves

recognized as heirs contradictorily with him; and the executor's death did not authorise the plaintiffs to proceed against this executor's administrator in order to have themselves recognized as heirs. C. P. Art. 1000; —C. C. Art. 1193 (1181).